Dedicated to the memory of James Cannepotatoe

REASSESSING THE PARADIGM OF DOMESTICATION: THE PROBLEMATIC OF INDIGENOUS TREATIES[*]

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The struggle of Indigenous peoples to gain recognition for their view of treaties is frequently a source of conflict between Indigenous and state parties, both in Canada and abroad. In this article, the author challenges the primitivist assumptions which continue to inform modern

Les efforts entrepris par les peuples autochtones pour faire reconnaître leur vision des traités est à l'origine de conflits fréquents avec la partie étatique, que ce soit au Canada ou ailleurs. Dans le présent article, l'auteur questionne les présupposés primitivistes régissant la

[*] The terms "Indigenous" and "Indigenous peoples" conform to international usage and are preferred here to specific, often government-promoted, appellations such as the Canadian "Aboriginal peoples." The qualifier Indigenous applies to a wide variety of peoples, most importantly, but not exclusively, the original inhabitants of former European settler colonies, which are the focus of this paper.

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Although I have followed the international Indigenous movement since 1977, my research on Indigenous treaties only started in 1991 when I was called upon to assist Professor Miguel Alfonso Martínez, the Special Rapporteur of the United Nations *Study on treaties, agreements and other constructive arrangements between states and indigenous populations*. The present article was partly informed by this research mandate (and by the challenges the Special Rapporteur saw fit to throw my way!). I have also undertaken independent, mainly archival and library, research in the United States and Canada. Part of that research was funded by the Smithsonian Institution (Washington D.C.) and the Fund of the Four Directions (New York City). Both contributions are gratefully acknowledged.

I also wish to say that I have greatly benefited from the discussions I have had over the last twenty years with Indigenous people, whether at the Palais des Nations in Geneva, in Canada, or elsewhere. In that connection I wish to acknowledge especially, once again, Sharon Venne, as well as the Chiefs and Elders who spoke to me about treaties and treaty-making.

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treaty jurisprudence, perpetuating the supremacy of state interpretation. The article begins by questioning the orthodox approach to relations between European powers and Indigenous peoples. Emphasis is placed on the process of domestication through which states aimed to subvert the position of Indigenous peoples as peoples, often ignoring or unilaterally amending treaties. This process resulted not only in the absorption of vast territories traditionally held by Indigenous peoples into the legal and political systems of the colonizers, but also in the emergence of a paradigm by virtue of which the factor of domestication was endowed with absolute explanatory value. The article also explores the views held by Indigenous peoples themselves on the treaty issue. It is argued that these views rely on a perspective recalling that of the Law of Nations era. Finally, the author addresses the relationship between law and culture in the treaty context. She argues that by defining the rights of Indigenous peoples in culturalist terms, one tends to blur the differences between Indigenous peoples and minorities. In contrast, when recognition of rights is derived from a relationship involving sovereign entities, the question of Indigenous peoples' rights is placed on another plane. The significance of this dichotomy clearly appears from a comparison of domestic efforts, such as the activities of the Royal Commission on Aboriginal Peoples, with international ones, especially the UN Study on treaties between Indigenous peoples and states.

jurisprudence moderne en matière de traités, qui contribuent en fait à asseoir la prépondérance de l'interprétation étatique. L'article étudie d'abord le point de vue orthodoxe sur les relations entre puissances européennes et peuples autochtones. L'analyse est centrée sur le processus d'internalisation par lequel les États ont cherché à saper la position des peuples autochtones en tant que peuples, en négligeant ou en modifiant unilaté-ralement les dispositions de traités existants. Ce processus a mené, non seulement à l'incoporation de vastes territoires autochtones au système politique et juridique des puissances coloniales, mais encore à l'émergence d'un véritable paradigme, en vertu duquel le facteur de l'internalisation se trouve doté d'une valeur explicative absolue. L'article aborde également les traditions que les peuples autochtones eux-mêmes maintiennent au sujet des traités, en soulignant que celles-ci restent fidèles à la perspective ayant prévalu à l'ère du droit des gens. Enfin, l'auteur aborde la question du rapport entre droit et culture dans l'analyse des traités. Elle montre qu'en définissant les droits des peuples autochtones en termes culturalistes, on réduit les peuples autochtones à des minorités. En revanche, si l'on fait dériver la reconnaissance de droits d'une relation entre entités souveraines, on place la question des peuples autochtones à un autre niveau. L'enjeu de cette dichotomie ressort clairement d'une comparaison entre initiatives nationales, comme les travaux de la Commission royale sur les peuples autochtones, et celles lancées sur le plan international, en tout premier lieu l'Étude de l'ONU sur les traités entre peuples autochtones et États.

I. INTRODUCTION

In his landmark *Study of the Problem of Discrimination against Indigenous Populations*, José Martínez Cobo, Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, emphasized the "paramount importance" of treaties for Indigenous peoples. For this reason he recommended that "a thorough and careful study ... of areas covered by the provisions contained in such treaties and conventions" be carried out. He emphasized that "in so doing, account must necessarily be taken of the points of view of all parties directly involved in such treaties;" these are

"primarily Governments and Indigenous nations and peoples which have signed and ratified such treaties."[1]

Such a study was entrusted in 1988 to Miguel Alfonso Martínez, a member of the United Nations Working Group on Indigenous Peoples.[2] He recognized at the outset that "the norms and customs that regulate the life of Indigenous populations" are to be placed on an equal footing with "public international law ... and the municipal law of the States." To this end, a transdisciplinary approach had to be worked out, for in his view a purely legal analysis could not render justice to the complexity of the issue. Because the treaty-making process involves parties "whose civilization, customs and perceptions on innumerable things are, in general, extremely different," he wrote, "it is imperative to fully understand the rationality of the actions" of the parties involved at all stages of the process.[3]

Indigenous peoples' representatives have contributed significantly to the United Nations treaty study, assured of the weight their submissions are bound to carry in view of the conclusions and recommendations to be formulated by Alfonso Martínez on completion of his mandate.

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1 *Study of the Problem of Discrimination against Indigenous Populations*, by José Martinez Cobo, vol. V "Conclusions, Proposals and Recommendations" (Geneva: United Nations, 1986, Sales No 5.86.XIV.3) paras. 388-392 [hereinafter *Problem of Discrimination*].

2 Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations, Preliminary Report*, by Miguel Alfonso Martínez, Special Rapporteur, 1991, UN doc. E/CN.4/Sub.2/1991/33, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations, First Progress Report*, by Miguel Alfonso Martínez, Special Rapporteur, 1992, UN doc. E/CN.4/Sub.2/1992/32 [hereinafter *First Progress Report*], Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations, Second Progress Report*, by Miguel Alfonso Martínez, Special Rapporteur, 1995, UN doc. E/CN.4/Sub.2/1995/27, [hereinafter *Second Progress Report*]; and Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations, Third Progress Report*, by Miguel Alfonso Martínez, Special Rapporteur, 1996, UN doc. E/CN./Sub.2/1996/23.

3 See the initial outline of the Study, reproduced as Annex III of the report of the Working Group on Indigenous Populations at its sixth session, UN doc. E/CN.4/Sub.2/1988/24/ Add.1 at paras. 22-26 [hereinafter *Initial Outline*].

At the national level, however, to the extent that treaties and treaty-making are a matter for debate in the first place, the welcome for Indigenous participation is far from assured. In countries such as the United States, New Zealand and Chile, Indigenous treaties tend to be regarded nowadays as relics of the past, at least on the state side. Sometimes attempts are made to do away with them. In the United States, for example, bills to abrogate ratified "Indian treaties" have repeatedly been drafted, and it may only be a matter of time until such legislation is enacted. In New Zealand, a policy known as the fiscal envelope, made public in December 1994, proposed to use government funds to buy land for Maori to foster economic development. This was to be done in exchange for the abrogation of the 1840 Treaty of Waitangi and the renunciation of any further Indigenous claims based on that treaty. It has met with considerable Maori resistance. Finally, in Chile, with its history of dozens of *parlamentos* (or peace conferences) between Indigenous peoples and the Spanish Crown or its territorial successor, a discussion of the actual implications of these accords has yet to occur despite demands made to this effect by Mapuche organizations.

The Canadian situation is somewhat different (although not fundamentally so, as will be shown below) because treaty-making with Indigenous peoples is on the political agenda, as is evidenced by the so-called comprehensive claims settlement policy initiated by the federal government in the 1970s. It remains to be seen in what manner these "modern treaties" compare to the policy of treaty-making promoted by the British Crown in the context of Britain's overseas expansion, or for that matter to international law principles governing treaties. Moreover, regarding the internationally publicized endeavors of the Royal Commission on Aboriginal Peoples,[4] it is far from certain that its conclusions and recommendations adequately reflect the numerous and detailed submissions made by Indigenous people on treaties and a vast range of other issues. There also is no guarantee that the Commission's conclusions will be heeded by the federal government or the Canadian courts.

The prevalent discourse and policy regarding Indigenous treaties is governed by what I shall term the paradigm of domestication, which is discussed in detail in Section III. By virtue of this paradigm, state action, such as the unilateral

[4] Royal Commission on Aboriginal Peoples, *Treaty Making in the Spirit of Co-existence: An Alternative to Extinguishment* (Ottawa: Minister of Supply and Services Canada, 1995) and Royal Commission on Aboriginal Peoples, "Restructuring the Relationship" Vol. 2, Part 1, of the *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Minister of Supply and Services Canada, 1996).

abrogation of treaties or the extension of legislative authority over formerly recognized spheres of Indigenous jurisdiction, is shielded from legal and political scrutiny. It is a paradigm grounded in *ex post facto* reasoning that projects into the past the current configuration of international relations and the pre-eminence of the state system, thus failing to address the colonial nature of the state in former European settler colonies.

Indigenous peoples are peoples yet to be decolonized. Historically, they must be viewed as part of the large number of overseas peoples with whom European powers entertained diplomatic, commercial and political relations during the era of their expansion abroad. When considering Indigenous treaties in light of the history of international relations since the "age of discoveries," one is led to challenge the paradigm of domestication on the basis of two main factors. These are the existence of significant differences between international law doctrine and state practice, and the relatively late development of a eurocentric and positivist outlook which goes hand in hand with the theory of constitutivism.[5]

It must also be stressed that Indigenous peoples have maintained an international perspective on the treaties to which they are parties. To detractors this position simply demonstrates nostalgia as well as an exaggerated, and now obsolete, attachment to a past when state governments took Indigenous peoples seriously enough to conclude international compacts with them. But can it be discounted simply on the presumption that the discourse of today's legal and political establishment fails to support it, particularly when that discourse bears testimony, above all, to "political policy" clothed in legal positivism?

A particular manifestation of the bias inherent in this state-supporting view of Indigenous treaties is the perception that the controversy is over treaty *provisions*, including their role as a source of municipal law,[6] rather than treaty-*making* as a mode of regulating relations between peoples or nations. As a result,

[5] That is, the theory which holds that states or sovereign entities only exist to the extent they are recognized as such by the majority of states.

[6] The issue of Indigenous treaties as a source of municipal law has been thoroughly researched. For the United States see for example: W.E. Washburn, *Red Man's Land, White Man's Law*, 2nd ed. (Norman: University of Oklahoma Press, 1995). For Canada see S. Grammond, *Les traités entre l'État canadien et les peuples autochtones* (Cowansville, Que.: Yvon Blais, 1995). For New Zealand see I. Brownlie, *Treaties and Indigenous Peoples* (Oxford: Clarendon Press, 1992).

conflicting views regarding the standing of historical treaties[7] may hinge on translation problems, discrepancies between written and oral versions, lack of implementation and so forth, and have started to be documented as such. In what follows I do not propose, however, to focus on these aspects.

It is my contention that the main problem is not the existence *per se* of conflicting interpretations of treaty provisions and contradictory accounts of treaty negotiations. Rather, the main problem lies in the failure of Indigenous parties to gain recognition for their own treaty discourse on an equal footing with that of state parties. In this manner, the supremacy of the state legal order is being affirmed without restraint; its corollary is the reduction of Indigenous legal systems to isolated "customs."

As an anthropologist, I am also concerned with the manner in which the legal establishment has portrayed Indigenous peoples and their modes of collective organization. In the Canadian context a number of questionable primitivist assumptions regarding Indigenous cultures still linger in recent jurisprudence. The most notorious example in this regard is undoubtedly the British Columbia Supreme Court ruling in the Gitksan and Wet'suwet'en case. It has been amply commented on since it was rendered, and subsequently challenged in the Supreme Court of Canada.[8]

Primitivist assumptions also govern much of the scholarship on Indigenous treaties. One example is the implication that Indigenous treaty parties failed to grasp the significance of the agreement reached with the Crown since they did not speak English, were illiterate, had no inkling of what a treaty was, or what Euro-Canadian society had in store for them. Such assumptions are offensive to Indigenous peoples since they rest on a notion of cultural authority regarding treaty interpretation that assumes that Euro-Canadian (legal) culture possesses the authority to propose an interpretive framework to resolve disputes involving Indigenous peoples and the treaties they are parties to. Moreover, these

[7] Or, for that matter, "modern" ones, considering the large amount of litigation brought about by the first comprehensive land claims settlement in Canada, namely the James Bay and Northern Quebec Agreement of 1975.

[8] *Delgamuukw* v. *British Columbia* (1991), 79 D.L.R. (4th) 185 (B.C.S.C.), varied (1993), 104 D.L.R. (4th) 470 (B.C.C.A.), reversed (1997), 3 S.C.R. 1010. For an anthropological analysis of the B.C. Supreme Court decision, see A. Mills, *Eagle Down is Our Law: Wit'suwit'en Law, Feasts, and Land Claims* (Vancouver: University of British Columbia Press, 1994).

assumptions are contradicted by the growing body of data bearing testimony to the, mainly oral, traditions upheld by Indigenous peoples on these matters.

It is ironic that the emerging debate over cultural accommodation with regard to Indigenous treaties is framed as a debate about shortcomings on the Indigenous side: illiteracy or lack of understanding — in short, culture shock. This is contradicted, in turn, by the idea of the "meeting of the minds" that is a permanent feature of Indigenous treaty discourse.

The question remains: can "otherness" ever be satisfactorily accounted for, whether in the legal domain in general or the treaty debate in particular? This is the question around which much of this paper revolves and upon which the problematic of Indigenous treaties is based.

One is confronted with another issue, namely that of minority cultural rights. Indigenous treaties, when addressed from the international perspective, lead one away from the type of "rights talk" generally associated with human and minority rights. Thus, the study of treaties between Indigenous peoples and states actually forces a distinction between Indigenous peoples and ethnic minorities. This distinction is already established at the level of the United Nations, although it is still rather blurred in much of the recent scholarly literature, notably in Canada.

The first of the four sections that follow sets the stage by recalling the role of today's Indigenous peoples in the history of European expansion overseas. Section III identifies different facets of domestication and explores their conceptual and theoretical implications. Section IV addresses the issue of treaty controversy, leading to Section V which is devoted to the problematic of Indigenous treaties.

Although this article focuses on North America, where the treaty issue has been studied most extensively, and gives theoretical prominence to the Canadian example, two other cases will also be considered for comparison. These are the examples of the Maori in Aotearoa/New Zealand and the Mapuche in Chile.

II. SETTING THE STAGE

In North America, the bargaining power of Indigenous peoples was a factor to be reckoned with in a context marked by the rivalry opposing major (France, Great Britain, Spain) and minor (Holland, Sweden, Russia) powers. It should be stressed from the outset that European powers striving to gain a foothold in North America generally admitted that the peoples they encountered had the

power to manage their own affairs in their own territories. They often made treaties with them to acquire land and to establish boundaries between their settlements and the Indigenous territories. There are literally hundreds of such treaties, the majority involving Indigenous peoples now residing within the borders of the United States. It should be added that considerable diversity could be found among the players on the Indigenous side. There were powerful confederacies, such as the Creek Confederacy, the Haudenosaunee and the Blackfoot Confederacy, which were capable of threatening European claims in the region. There also were an array of smaller peoples whose interest for Europeans depended on what they had to offer: furs, land, labour, mineral resources, and so forth.

Strong evidence of manifold relations between European powers and Indigenous peoples, both in North America and elsewhere, makes it doubtful that the idea of a family of allegedly civilized nations facing a legal void peopled by "barbarians" or "savages" ever represented valid international law, when understood as customary law and expressed in state practice. According to Alexandrowicz, "the way in which the development of the family of nations has been described in nineteenth- and twentieth- century treatises of international law calls for reconsideration."[9]

Whatever the *doctrine* may have been at one particular point in time, state *practice* is indeed most relevant to assess the history and significance of treaty-making between European powers and overseas peoples, provided it is both extensive and uniform. This observation applies not only to contemporary situations (*e.g.* the role of the international community in the field of human rights protection) but also to historical ones such as the overseas expansion of European powers from the sixteenth century on.

From the point of view of state practice, the widespread assumption that "backward" peoples could not lay claim to sovereignty is also a relatively recent one. Only in the second half of the nineteenth century did a positivist and eurocentric view denying non-European peoples an international legal personality arise, which made international recognition of such peoples dependent upon their "civilization" under the guidance of European powers. According to M.F. Lindley, the legal-philosophical literature between the sixteenth and the mid-nineteenth century revealed "a persistent preponderance of juristic opinion in favour of the proposition that lands in the possession of any

9 C.H. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies* (Oxford: Clarendon Press, 1967) at 235.

backward peoples who are politically organized ought not to be regarded as if they belonged to no one." But Lindley notes, "especially in modern times, a different doctrine has been contended for ... which denies that International Law recognizes any rights in primitive peoples to the territory they inhabit and, in its most advanced form, demands that such peoples shall have progressed so far in civilization as to have become recognized as members of the Family of Nations before they can be allowed such rights."[10]

While the hiatus between state practice and the doctrine of international law has been assessed comprehensively for some regions,[11] one notes a certain complacency among the legal establishment about the non-international character of treaties involving Indigenous peoples in former European settler colonies such as Canada, the United States, New Zealand and Chile (to cite but the cases discussed here). There is, however, nothing self-evident about this proposition. The evolution of treaty-making clearly reproduces the pattern alluded to above, for domestication of relations with Indigenous peoples generally reached its apotheosis only in the second half of the nineteenth century. This occurred mainly via the unilateral extension of state or federal legislative power over Indigenous peoples and communities decimated and weakened by disease, assailed by assimilationist policies, and whose traditional means of survival were being destroyed.

Both international law and so-called "native law"(that is, state law applying to Indigenous peoples in former European settler colonies) are therefore vulnerable to "political policy," beyond strictly legal considerations. At the municipal level this is illustrated by state legislative action grounded on the paradigm of domestication, and at the international level, by an adroit confusion between the legal doctrine and the actual practice of states. This is the backdrop against which this article proposes to address the problematic of Indigenous treaties.

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In North America, treaties of peace, friendship and commerce incorporated principles of alliance and peaceful coexistence without interference. They have come to be associated with the Two Row Wampum whose two parallel rows of beadwork represent a relationship between parties that are sovereign yet united by a common destiny. As Oren Lyons reminded the United Nations General

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[10] M.F. Lindley, *The Acquisition and Government of Backward Territory in International Law* (London: Longmans, 1926) at 20.

[11] For example, see Alexandrowicz, *supra* note 9, and C.H. Alexandrowicz, *The European-African Confrontation: A Study in Treaty-Making* (Leiden: A.W. Sijthoff, 1973).

Assembly during the opening ceremony for the International Year for the World's Indigenous Peoples (1993): "Even though you and I are in different boats — you in your boat and we in our canoe — we share the same river of life. What befalls me, befalls you. And downstream, downstream in this river of life, our children will pay for our selfishness, for our greed, and for our lack of vision."[12]

Some of the early peace and friendship treaties also provided for limited cessions of land to settlers. For instance, in June 1683, two years after the arrival of the first Quakers in what was to become Pennsylvania, William Penn entered into a peace treaty with the Delaware. No document of this treaty survived. According to Jennings "there is ample evidence that Penn himself kept his pledged word but that his successors violated the Delaware treaty and destroyed the document that would have exposed their breach of faith."[13] In support of this position Jennings states: "the best evidence that the treaty took place is the fact of Penn's purchase of Delaware lands. Such transactions could not have been made without prior political agreements, whatever those agreements may have been."[14]

The bargaining power of Indigenous peoples remained a crucial factor all through the eighteenth century. In what is now eastern Canada, treaty-making played an important role, both in the development of the Covenant Chain and in the evolution of the situation in New France.[15] After the French and Indian War (1755-1763), the British sovereign George III reconfirmed the boundaries between the colonies and the Indigenous territories in the *Royal Proclamation*

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[12] Cited in A. Ewen, ed., *Voice of Indigenous Peoples: Native People Address the United Nations* (Santa Fe, NM: Clear Light Publishers, 1994) at 35. For a study of this and similar visions with a focus on the law of nations era see R.A. Williams Jr., *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800* (New York: Oxford University Press, 1997).

[13] This treaty violation is known as the Walking Purchase. See F. Jennings, "Brother Miquon, Good Lord!" in R.S. and M.M. Dunn, eds., *The World of William Penn* (Philadelphia: University of Pennsylvania Press, 1986) at 198.

[14] See Jennings, *ibid.* at 199-200. See also J.R. Sonderlund, ed., *William Penn and the Founding of Pennsylvania* (Philadelphia: University of Pennsylvania Press, 1983) 156-62 and 287-88.

[15] See for example F. Jennings, *The Ambiguous Iroquois Empire* (New York: W.W. Norton & Company, 1984); R. Savard, *L'Algonquin Tessouat et la fondation de Montréal: Diplomatie franco-indienne en Nouvelle-France* (Montréal: Edition de L'Hexagone, 1996); and G. Havard, *La Grande Paix de Montréal de 1701* (Montréal: Recherches amérindiennes au Québec, 1992).

of 1763, which also established that all cessions of territory must be undertaken by seeking Indigenous consent. In the ten years following the Royal Proclamation, the British concluded over two dozen treaties with Indigenous peoples in North America to neutralize French and Spanish contenders for trade and settlement privileges, treaties which (not surprisingly in retrospect) failed to find their way into the major treaty collections.[16]

It is worth emphasizing that treaty-making with Indigenous peoples, while generally associated with British imperial policy, also was pursued by other countries, such as France and Spain. Admittedly, Spanish colonial policy was not grounded on the principle of seeking Indigenous consent to the acquisition of territory. Nonetheless, the Spanish Crown was compelled to negotiate treaties with Indigenous peoples when competing with other European powers or when seeking to gain a foothold in areas lying on the fringes of the pre-Columbian empires. Thus in North America, Spain concluded treaties with Indigenous peoples such as the Choctaws of *Nueva Vizcaya*, in what is now the American Southeast.[17] Relevant South American examples include the peace treaties (*parlamentos*) concluded with the Mapuche of present-day Chile, which over two centuries consistently asserted the existence of an independent Mapuche territory south of the Bíobío river.

In the United States, Indigenous peoples continued to play a strategic role for several decades after independence in 1776. The U.S. federal government still feared the outbreak of "Indian wars" and the possibility of dangerous alliances between Indigenous peoples and the English or Spanish, because the Americans had claimed sovereignty over a territory bordering on the territories of various Indigenous peoples as well as the zones of influence of Britain and Spain.

In a spirit similar to that of the British Royal Proclamation, a policy statement released in October 1783 committed the U.S. Congress to obtain land cessions through treaties and to establish mutual boundaries with Indigenous peoples.[18] During the constitutional era, that is, the 1780s and 1790s, the federal government's main concern was to secure exclusive authority to conduct

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[16] D.V. Jones, *License for Empire: Colonialism by Treaty in Early America* (Chicago: Chicago University Press, 1982) at 14.

[17] For example, the Treaty of Alliance between Spain and the Choctaw and other Indian nations, signed at Movila on 14 July 1784, reproduced in C. Parry, ed., *The Consolidated Treaty Series,* vol. 49 (Dobbs Ferry, N.Y.: Oceana Publications, 1969) at 107-112.

[18] For example R. Horsman, *Expansion and American Indian Policy, 1783-1812* (Norman, University of Oklahoma Press, 1992 [1967]).

relations with Indigenous peoples. This is clearly illustrated by clauses barring Indigenous parties from treating with rival European powers or individual American states. For example, Article II of the Treaty of Peace and Amity between the United States and the Creeks, signed on 7 August 1790, stipulated "that the said Creek Nation will not hold any treaty with an individual State, or with individuals of any State."[19]

Another illustration of the initial federal approach to Indigenous peoples can be found in the Treaty of Fort Pitt (17 September 1778), by which the U.S. federal government sought to gain an alliance with the Delaware to ensure right of passage for federal troops against the British. The Delaware agreed to let troops pass through their territory, to sell them corn, meat, horses, and other supplies, and even to bring their own warriors to enlist in the American army. In exchange, the Treaty of Fort Pitt recognized, *inter alia*, statehood for a confederation of Indigenous nations under the leadership of the Delaware with a representative in Congress. Although this stipulation was never implemented it is far from insignificant, since a few later treaties contain a similar provision. In his monumental *Handbook of Federal Indian Law*, Felix Cohen quotes a report of the House Committee on Indian Affairs in connection with the Trade and Intercourse Act of 1834, according to which the proposition to assure Indigenous representation in Congress "ought to receive a favorable consideration."[20]

The North American situation is reflected in the region of the Southern Cone where the Mapuche managed to preserve their sovereignty until the mid-nineteenth century, successfully fending off Spanish and later Chilean (and Argentine) domination. In their long war of resistance (or *guerre de Arauco*) peace conferences (or *parlamentos)* played a crucial role leading to oral or written agreements between the colonial authorities and the Mapuche. The most significant *parlamento* in the seventeenth century was the 1641 peace conference of Quilín (*paces de Quilín*) which recognized Mapuche sovereignty in an area extending south between the Bíobío and the Toltén rivers. The parties also agreed on the establishment of missions and trade relations. This accord was reiterated throughout the colonial era, until the last *parlamento* of colonial

[19] C.J. Kappler, ed., *Indian Affairs. Laws and Treaties* (Washington: Government Printing Office, 1904) at 25.

[20] *Felix Cohen's Handbook of Federal Indian Law* (Five Rings Corporation, 1986 [facsimile of 1942 edition]) at 42.

times, convened at Negrete in 1803.[21] It then took the Republic of Chile, founded in 1817, about seven decades to subdue the Mapuche of southern Chile, who enjoyed a special status precisely on the basis of the *parlamentos*. In the process, the Chilean government was compelled to seek agreements with them until the mid-nineteenth century.[22]

Under the impact of growing settler pressure, the position of the Indigenous peoples in the Americas was altered profoundly. In the United States, hostility between the "tribes" and growing colonies became frequent, and the federal government often sent military expeditions against even former allies such as the Delaware. With the shifting balance of power, the modalities of treaty-making, and the treaty provisions themselves, necessarily changed. A first inkling of this shift can be found in the Treaty of Greenville, signed on 3 August 1795, as a result of the battle of Fallen Timber (1794), at which the Indigenous parties (including Wyandot, Delaware, Shawnee, Chippewa, Potawatomi, Ottawa, Miami and Kickapoo) suffered a heavy military defeat and were compelled to surrender much of what was then Ohio Territory to the United States. *Parlamentos* also might be used as outright tools of territorial dispossession. An equivalent of the Treaty of Greenville is the *parlamento* of Las Canoas, convened in 1793 by the Governor of Chile with the Huilliche after they had risen against the colony in 1792 and were defeated. By this agreement, the Huilliche ceded important portions of their territory to the Spanish Crown.

In North America, this pattern recurred many times after the Anglo-American War of 1812 and the Treaty of Ghent of 1815, leading to confirmation of U.S. supremacy in the region. As a consequence, treaties with Indigenous peoples started to be used as a convenient means to extinguish native title to vast tracts of land or to force relocation. This was the case during the 1830s under the notorious removal policy that affected Indigenous peoples of the south-eastern

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21 See S. Villalobos, "Guerra y Paz en la Araucanía: periodificación" in S. Villalobos *et al.*, *Araucanía. Temas de Historia Fronteriza* (Temuco: Ed. Universidad de la Frontera, 1989) at 7; H. Casanova Guarda, *Las rebeliones araucanas del siglo XVIII* (Temuco: Ed. Universidad de la Frontera, 1987); M. Méndez Beltrán, "La organización de los parlamentos de indios en el siglo XVIII" in S. Villalobos *et al.*, *Relaciones fronterizas en la Araucanía* (Santiago: Ed. Universidad Católica, 1982) at 107.

22 J. Bengoa, *Historia del pueblo mapuche. Siglo XIX y XX* (Santiago: Sur, 1985) at 33 and 137; and I. Schulte-Tenckhoff, "Traités, parlamentos et le statut des nations amérindiennes" (1994) 63 Caravelle 175.

United States.[23] It was of little avail to the Cherokees, Creeks, Chickasaws, Choctaws and Seminoles that they had signed treaties with the federal government to protect their land base and traditional jurisdiction. Their forced removal under President Jackson to an "Indian Territory" west of the Mississippi was unlawful, but had become politic under massive settler pressure.

It ought to be stressed that treaties incorporating land cession or removal clauses did not provide explicitly for the surrender of Indigenous jurisdiction over non-ceded lands. Equally, the federal assumption of plenary powers in the sense of unrestricted powers to adopt legislation affecting Indigenous peoples, to terminate unilaterally existing treaties, or to intervene in any other way, without seeking Indigenous consent, is not supported by the U.S. Constitution. According to Curtis Berkey, there is no indication that Congress initially thought it had authority over the internal affairs of any Indigenous people. Consequently, "the modern conception of the status of Indian nations and the scope of congressional authority is radically different from the original understanding of the framers [of the Constitution]."[24] He adds: "If the intent of the framers were the sole guide to determining the scope of congressional authority, a vast array of oppressive acts of Congress would most likely be unconstitutional. For example, Congress probably would no longer be free to abrogate Indian treaties with impunity, to terminate the powers of Indian governments, to impose federal and state laws within sovereign Indian territory, and to expropriate Indian land."[25] Much of the treaty controversy in the United States flows from this ambiguity, most eloquently expressed in the concept of "domestic dependent nation" coined by Chief Justice John Marshall of the U.S. Supreme Court in 1832.[26]

Vine Deloria has analyzed the emergence of the legislative branch as the "dominant actor in the formulation of Indian policy" in the United States. In his view treaty-making did not escape this trend; from the mid-nineteenth century on, treaties started to be handled "like a peculiar form of legislation with material changes in the provisions, primarily in response to pressures from

23 For example G. Forman, *Indian Removal*, new edition (Norman: University of Oklahoma Press, 1953).

24 C.G. Berkey, "United States-Indian Relations: The Constitutional Basis" in O. Lyons and J. Mohawk, eds., *Exiled in the Land of the Free* (Santa Fe: Clear Light Publishers, 1992) at 224.

25 *Ibid.* at 225.

26 *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832) [hereinafter *Worcester*].

private pressure groups and territorial governments."[27] Deloria refers to the amendments made to the 1851 Treaty of Fort Laramie in the course of ratification by the U.S. Senate without the knowledge or consent of the Indigenous parties. The introduction of amendments at the time of ratification became more frequent in the later stages of treaty-making with Indigenous peoples. So too did failure to ratify.[28] Yet according to Prucha, of the 354 treaties listed in the official sources, 285 (that is, about 80 per cent) were ratified more or less unanimously by the U.S. Senate.[29]

The fundamental ambiguity of American policy towards Indigenous peoples as "domestic dependent nations" hinges on the idea of residual tribal sovereignty, or quasi-sovereignty. This is in contrast to Canada and Latin America where doctrine holds that Indigenous rights exist only to the extent that the state declares them to exist. In the United States, the principle of tribal quasi-sovereignty means that "Indian tribes" are at one and the same time sovereign and wards of the federal government: "those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express act of Congress, but rather inherent powers of a limited sovereignty which have never been extinguished."[30]

While residual sovereignty continues to be exercised within the boundaries of the tribes' reservation lands, it has been progressively curtailed. On the one hand, U.S. courts have tended to argue for internal tribal sovereignty when it was a matter of excluding Indigenous people from rights guaranteed to other citizens. One late nineteenth-century decision involving the Cherokee held that constitutional guarantees did not apply to them because their "powers of local

[27] V. Deloria Jr., "The Application of the Constitution to American Indians" in Lyons and Mohawk, *supra* note 24 at 291-292.

[28] In 1851, the U.S. Senate refused to ratify eighteen treaties concluded with "Indian tribes" in California under pressure of the State legislature which opposed the principle that certain lands might be reserved for Indigenous peoples in exchange for those ceded to the United States. Between 1821 and 1869, the United States failed to ratify more than eighty treaties with Indigenous peoples.

[29] F.P. Prucha, *American Indian Treaties: The History of a Political Anomaly* (Berkeley: University of California Press, 1994) at 434.

[30] Cohen, *supra* note 20 at 122. The notion of quasi-sovereignty was elaborated by Chief Justice John Marshall in the two so-called Cherokee Nation cases: *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831); and *Worcester*, *supra* note 26. For a legal-historical analysis see J. Norgren, *The Cherokee Cases: The Confrontation of Law and Politics* (New York: McGraw Hill, 1996).

self-government" predated the American Constitution.[31] On the other hand, tribal sovereignty has been restricted significantly in areas which are of interest to the wider society, such as the exploitation of mineral resources and waterways.

Congress now claims as part of its plenary powers the right to abrogate unilaterally some aspects of these treaties with Indigenous peoples without disturbing the force of the treaty itself. Thus, treaty provisions vesting land title in the U.S. would remain inviolate while others likely to place a burden upon the federal government could be dispensed with at will. To put it in a nutshell: by virtue of "quasi-sovereignty," Indigenous peoples were sovereign enough to enter into treaties with the purpose of ceding legal title to their lands and territories, but were not sovereign enough to continue to function as independent political entities.[32] Nor, for that matter, were they sovereign enough to protect the remnants of their sovereignty against incursions of the state.

The efficacy of U.S. policy did not go unnoticed abroad. Cornelio Saavedra, who played a major role in the so-called pacification of the Chilean province of Araucania in the late nineteenth century, applied a number of the practices tested in the settlement of the American Far West. These included railroad construction, the enactment of statutes unilaterally extending state sovereignty over Indigenous territories, and the active promotion of European settlement which, in turn, served as a pretext forcibly to relocate the Mapuche onto reservations.[33]

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Treaty-making with Indigenous peoples in North America and elsewhere underwent profound changes, depending on the shifting fortunes of Indigenous peoples in relation to the settler societies. However, this process of domestication of relations with Indigenous peoples only reached completion in the second half of the nineteenth century, mainly via the unilateral extension of state or federal legislative power. Especially in the final decades of the nineteenth century, attempts were made to foster the assimilation of Indigenous peoples by enacting legislation to that effect, such as the Canadian *Indian Act* (1876) and in the United States, the *Seven Major Crimes Act* (1885) and the *Dawes Severalty Act* (1887). Such legislation extended state jurisdiction over

[31] *Talton* v. *Mayes*, 163 U.S. 376 (1896).

[32] W. Churchill and G.T. Morris, "Key Indian Laws and Cases" in M.A. Jaimes, ed., *The State of Native America* (Boston: South End Press, 1992) at 18.

[33] Bengoa, *supra* note 22.

key domains and, most importantly, provided for profound changes in land tenure.

Indigenous peoples are mainly characterized by their historical relationship with the land. This is clearly established at the international level. According to Martínez Cobo: “As regards the circumstance that gave rise to the notion of indigenous population, it must be said that the special position of indigenous populations within the society of nation-States existing today derives from their historical rights to their lands, as well as from their right to be different, and to be considered as different.”[34]

The American *Dawes Severalty Act* or *General Allotment Act* of 1887 disrupted traditional systems of collective land tenure by promoting fee simple ownership, for which Indians had to apply. Grants were made within the confines of reserved areas on the basis of racial criteria. “Full-blooded” Indians received their land in trust from the federal government for a certain period of time, while Métis received fee simple deeds outright in exchange for American citizenship — the U.S. version of “enfranchisement.” Many Indigenous people failed to apply for a variety of reasons, or did not wish to do so; thus a “surplus” of land was created, which was then sold for a profit to non-Indigenous owners. In this manner, about two thirds of land previously reserved — mainly by treaty — was lost to Indigenous peoples.[35]

Similar processes occurred in other countries. In Chile, the situation of the Mapuche changed significantly in the mid-nineteenth century when the central government started to encourage actively European immigration to develop the country’s agriculture. The settler frontier rapidly crossed the Bíobío river, forcing large numbers of Mapuche families off their land. In 1852 the province of Arauco was created to serve as the Chilean outpost in the territory situated immediately south of the Bíobío. By the same token, the Chilean government assumed jurisdiction over the new province and purported to “protect” and “civilize” the Indians. Legislation enacted in 1866 provided for the incorporation of Mapuche lands into the public domain, while the Mapuche themselves were denied recognition of their aboriginal title. To obtain legally recognized title, they had to apply for so-called *títulos de merced*, that is, deeds granted at the pleasure of the state. After their victory in the war of the Pacific with Bolivia-Peru, the Chilean army became active in southern Chile. In 1885 the Mapuche

[34] *Problem of Discrimination*, *supra* note 1 at para. 373.

[35] For example J.A. McDonnell, *The Dispossession of the American Indian, 1887-1934* (Bloomington: Indiana University Press, 1991).

suffered military defeat. Araucania was then occupied by the army, and demobilized military personnel and newly arrived settlers received land allotments. By and large, concern with the land question has been the main motive for government action regarding the Mapuche. Between 1883 and 1972 more than thirty laws and decrees were passed which dealt with Mapuche land tenure and assimilation into mainstream society. For example, various policies of agrarian reform were launched between 1928 and 1962, which the Chilean government used to promote assimilation on the basis of allotting individual plots. Gradually, Mapuche land holdings were fragmented and reduced considerably (some say by 95 per cent), while the land holdings of the other Indigenous groups in Chile (*e.g.* Diagitas, Aymaras, Atacameños or Yaganas, as well as the Rapa Nui of Easter Island) were not protected at all.[36]

Finally, in New Zealand after the signing of the Treaty of Waitangi in 1840,[37] pre-emption or purchase of Maori communal lands was pursued by the British Crown as a legal means to extinguish Maori title. 1862 saw the passage of the *Native Land Rights Act*. This was repealed and replaced in 1865 by an act of the same name, which instituted the Maori Land Court. The purpose of this Court was to define and settle Maori proprietary rights pertaining to land held customarily, and to settle the position of the Crown regarding its right of pre-emption. Not surprisingly there is little left of Maori customary land; the Maori Land Court has played a crucial role in converting customary land held communally into freehold land held under common law individual tenure. Subject to the now prevalent protective jurisdiction of the Court, such land may become available to Pakeha.[38] Today the Maori landbase is extremely reduced.[39]

Many more examples could be invoked to illustrate the process of domestication set in motion in former European settler colonies with a view to

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[36] The recent *Ley Indígena*, which entered into force on 5 October 1993 as Law N° 19.253 and was enacted in the pluriculturalist spirit that now seems to prevail in a number of Latin American countries, remedies this by recognizing in Article 1 the "ethnic and cultural diversity" of the Chilean nation and by identifying Chile's Indigenous peoples. On the other hand, Indigenous rights are defined individually and on the basis of a contingent rights approach, a situation similar to that prevailing in Canada. In order to be recognized as Indigenous, a person must obtain a certificate from CONADI, *Corporación Nacional de Desarollo Indígena*, created pursuant to Section VI of Law N° 19.253.

[37] For the Treaty of Waitangi, see *infra* Section IV.

[38] Pakeha: non-Maori of European origin.

[39] I.H. Kawharu, *Maori Land Tenure. Studies of a Changing Institution* (Oxford: Clarendon Press, 1989).

legislating the Indigenous question out of existence. But the point I wish to make is of a different order, for domestication not only happened, it also forms a paradigm which constrains possible solutions to the plight of Indigenous peoples. For this reason it deserves closer scrutiny.

III. THE PARADIGM OF DOMESTICATION[40]

A paradigm is the prevailing "model problems and solutions" which dominate scientific activity at a given time. Although Kuhn, the first to define this now widely applied concept, elaborated his thinking within the framework of the natural sciences,[41] there is no reason not to extend it to other domains of scholarly interest,[42] in this instance, legal theory and historiography. According to Kuhn, evidence against a given paradigm accumulates over time, until it becomes overwhelming and provokes what he calls a paradigmatic shift.

Regarding the domestication of the treaty process between Indigenous peoples and settler states, a paradigmatic shift is definitely in order. This is especially true in Canada where treaties constitute a key theme in the debate over present and future relations between Indigenous peoples and the state. Treaty adjudication in its present form illustrates an institutional bias inherent in the paradigm of domestication, for it favors one treaty party, the state, in every instance. By comparison, the particularity of the Canadian situation is that treaty-making still holds a position on the political agenda and that crucial issues are not confined to adjudication of claims arising from violations of historical treaties, as is the case in the United States or New Zealand. Yet the present-day treaty method does not shun the paradigm of domestication, any more than the usual procedures of treaty adjudication. Undoubtedly, both these situations will pose a major challenge to the United Nations treaty study.[43]

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[40] A preliminary formulation of this idea is contained in I. Schulte-Tenckhoff, *La Question des peuples autochones* (Brussels: Bruylant, 1997) at 168.

[41] T.S. Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1962).

[42] I applied some of Kuhn's concepts in an analysis of potlatch theories. See I. Schulte-Tenckhoff, *Potlatch: conquête et invention* (Lausanne: Editions d'en bas, 1986).

[43] It will be interesting to see the conclusions and recommendations formulated by the Special Rapporteur on this subject; these will be included in his final report scheduled for submission to the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1998.

Another bias inherent in this paradigm also will be considered here, namely, the political bias apparent in some key scholarly literature.

The U.S. government officially abandoned the treaty method by virtue of a rider attached to the *Indian Appropriation Act* of 1871[44] (while north of the 49th parallel, at the very same moment, treaty-making with Indigenous peoples continued to be pursued actively by the British Crown, following the west- and northward expansion of the settler frontier). This change of American policy has been used to argue for the disappearance of the force of the treaties then in existence. Felix Cohen declares that this is erroneous, and affirms that when assessing Indigenous treaties, one must from the outset "dispose of the objection that such treaties are somehow of inferior validity or are of purely antiquarian interest." He adds: "Although treaty making itself is a thing of the past, treaty enforcement continues."[45]

In the United States, Indigenous peoples approached the federal court system to enforce treaty rights, even though this system was not favorable to their cause. For example, in 1891 Congress passed the *Indian Depredations Act* which allowed claims against Indigenous peoples by white settlers who had suffered damages during the frontier wars. Indigenous peoples were barred from similar suits. They could sue for unjust takings of land only when Congress had passed specific jurisdictional statutes granting them this right.

In 1946 the Indian Claims Commission was established to seek remedies for Indigenous peoples who had been subjected to land expropriation by the United States, "whether as the result of a treaty of cession or otherwise."[46] Hundreds of land claims were filed, but Indigenous peoples had to allege that the government

[44] It has been argued, however, that the agreements which replaced treaties after 1871 only differed from them in procedural terms. According to V. Deloria: "The United States received great benefits from the agreements signed with the tribes. It promised in some cases benefits even greater than those found in treaties. Numerous cases have been cited which support the proposition that agreements with Indian tribes have the same validity and sacred legal character as to treaties." See the "Preface" to V. Deloria Jr., ed., *A Chronological List of Treaties and Agreements Made by Indian Tribes with the United States* (Washington D.C.: Institute for the Development of Indian Law, 1973) at 2.

[45] Cohen, *supra* note 20 at 34.

[46] *An Act to Create an Indian Claims Commission*, Ch. 959, 60 Stat. 1049 (1946) at 1050.

had taken their lands illegally and they could only seek monetary redress.[47] Vine Deloria summarized the process in the following terms:[48]

> Since many large areas of land had not been formerly or formally ceded by the Indian nations, the effect of the work of the Indian Claims Commission was to retroactively transfer title to large tracts of land owned by the Indians to the United States by using the fictional device which asserted that the lands had been permanently lost. Deprived of the right to sue for title to their lands, the Indian nations were simply stripped of their legal rights for a pittance.

The example of the Indian Claims Commission illustrates the ambiguity of the principle of trusteeship associated with Indigenous "quasi-sovereignty." Before the Commission, the federal government claimed to be acting as trustee on behalf of the Indigenous claimants. In reality it was led to act in the "best interest" of non-Indians as well. Consequently, "the U.S. was busily casting a veneer — but not the reality — of legitimacy over many of its land acquisitions in North America."[49] The result of such action tests the widespread idea that treaty claims, or other claims for that matter, can be dealt with satisfactorily and justly within the doctrinal framework and legal system of one party only, namely the state party.

Not only is the cultural authority underlying that doctrinal framework and legal system problematic in this regard (as I argue below), but so is the implicit politics of legal positivism, whether applied at a practical level or in a more scholarly context. In either case one is dealing with an essentialist view of domestication. That is, while domestication is historically and politically circumscribed, conventional wisdom takes it to be endowed with absolute analytical, explanatory or interpretive power.

In Canadian legal discourse this form of juristic essentialism finds its most eloquent expression in the concept of Indigenous treaties as instruments *sui generis*, a concept well anchored in the jurisprudence. One decision from 1985 defines the Indian treaty as "unique" and "an agreement *sui generis* which is neither created nor terminated according to the rules of international law."[50] In a more recent decision the court opined that: "at the time with which we are concerned [1760], relations with Indian tribes fell somewhat between the kind

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[47] For example I. Sutton, ed., *Irredeemable America: The Indians' Estate and Land Claims* (Albuquerque, NM: University of New Mexico Press, 1985).

[48] Deloria, *supra* note 27 at 289.

[49] Churchill and Morris, *supra* note 32 at 15.

[50] *R.* v. *Simon* (1985), 24 D.L.R. (4th) 390 (S.C.C.) at 404.

of relations conducted between sovereign States and the relations that such States had with their own citizens."[51]

It is worth noting that these findings are not shared by the Special Rapporteur of the United Nations study on treaties between Indigenous peoples and states, who concluded with regard to North America:[52]

> In establishing formal legal relationships with Indigenous North Americans, the European parties were absolutely clear .... about a very important fact; namely that they were indeed negotiating and entering into contractual relations with sovereign nations, with all the legal implications that such a term had at the time in international law.

This difference of opinion undoubtedly proceeds from a corresponding difference in the evidence considered and, more importantly, from divergent views on the theoretical and political underpinnings of the discourses of law.

An interesting reflection of the pre-eminence of political opinion over historical and legal evidence can be found in the scholarly literature, for example, in Father Prucha's recent book on the "anomaly" of Indigenous treaties. Perturbed by what he calls "treaty rights activism," Prucha sets out to demonstrate that Indigenous treaties "exhibit irregular, incongruous or even contradictory elements and did not follow the general rule of international treaties."[53] However, this assertion is not borne out by the hundreds of pages of expert analysis provided by this historian whose scholarship regarding relations between Indigenous peoples and settler society is otherwise highly regarded.

The question is, of course: anomaly in relation to what? What is or what was the norm? According to John Marshall:[54]

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term "nation," so generally applied to them, means "a people distinct from others." The constitution, by declaring treaties already made, as well as those to be made, to be the

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[51] *R.* v. *Sioui* (1990), 70 D.L.R. (4th) 427 (S.C.C.) at 437.

[52] *First Progress Report*, *supra* note 2 at para. 138, and *Second Progress Report*, *supra* note 2 at paras. 130-133.

[53] Prucha, *supra* note 29 at 2.

[54] *Worcester*, *supra* note 26 at 559.

> supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well-understood meaning.

And:[55]

> What is a treaty? The answer is, it is a compact formed between two nations or communities, having the right of self government ....The only requisite is, that each of the contracting parties shall possess the right of self government, and the power to perform the stipulations of the treaty."

According to Felix Cohen, treaty-making with Indigenous peoples employed "terms familiar to modern international diplomacy," and "[m]any provisions show the international status of the Indian tribes, through clauses relating to war, boundaries, passports, extradition, and foreign relations." Moreover "[m]any treaties fixed the boundaries between the United States and Indian tribes, and between Indian tribes," and treaties frequently "prohibited the trespass or settlement of American citizens on Indian territory, unless licensed to trade." Cohen also noted: "Additional evidence of the national character of the Indian tribes appears in the provisions requiring passports for citizens or inhabitants of the United States to enter the domain of an Indian tribe ...." Such provisions were "supplemented by statutes which required citizens of the United States, as well as foreigners, to secure passports before entering the Indian country, this statutory requirement being later waived in the case of citizens." Finally, "[t]he surrender of fugitives from justice by one nation to another is usually covered by treaty; similarly with the Indians and the United States." Until approximately the 1830s "political relations of many of the Indian tribes were not confined to the United States" since agreements between Indigenous nations and the Republic of Mexico or the Republic of Texas, as well as treaties among Indigenous nations, "were formally recognized by the United States."[56]

When considering the issue from a purely legal viewpoint, one has to proceed in more hypothetical terms since the only codified rules regarding treaties, set out under the *Vienna Convention on the Law of Treaties*,[57] do not apply to Indigenous treaties. This is not because these treaties fail to be treaties of international law *per se*, but because the Convention only binds states which

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[55] *Ibid*. at 581.

[56] Cohen, *supra* note 19 at 39-40.

[57] 27 January 1980, 1155 U.N.T.S. 232 at 353. P. Reuter, *Introduction au droit des traités* (Paris: Librarie Armand Colin, 1985).

have formally adhered to it and does not apply retroactively. With this caveat: it is relevant to recall that, by and large, Indigenous treaties were concluded by commissioned representatives. They dealt with objects admitted under international law, such as making peace, regulating commerce, ceding or receiving sovereign rights, and seeking international protection. They were generally fixed in writing, though this was not an absolute condition. They also were subjected to appropriate ratification procedures (the fact that the legal establishment ignores Indigenous ratification procedures does not legitimize the assumption that such procedures were nonexistent). They were the result of negotiations and solemnly entered into. Finally, they were considered to be binding.[58]

In alleging that Indigenous treaties contain "irregular, incongruous or even contradictory" elements, Prucha makes a political statement and bears testimony to the pervasive nature of the paradigm of domestication. Incidentally, Prucha's claim has its own irony. Were one to bring it to its logical conclusion, it would mean that the United States acquired their land base and jurisdiction unlawfully. Yet this is an accusation that states (especially those in the Western world) seek to escape in the face of the growing concern of the international community with the rights of Indigenous peoples, and the emergence of what may be termed an international Indigenous movement.

In establishing the pre-eminence of the state system, the paradigm of domestication fails to address the colonial nature of the state in former European settler colonies.[59] Yet the historical continuity of the peoples now termed "Aboriginal" or "Indigenous" can hardly be denied. They form part of the vast number of overseas peoples with whom European powers entertained diplomatic, commercial and political relations during the entire era of their expansion abroad. In this sense the paradigm of domestication feeds on *ex post facto* reasoning that projects into the past the current configuration of international relations. It is also evidence of what J.M. Blaut has called eurocentric diffusionism, that is, a system of ideas based on the assumption that the world has an Inside and an Outside, and that world history is basically the history of the Inside. Accordingly, "[h]istorical progress still came about because Europeans invented or initiated most of the crucial innovations, which only later spread out to the rest of the world," such as written languages

58 There are numerous illustrations. For example: Prucha, *supra* note 29; and H. Viola, *Diplomats in Buckskins* (Washington D.C.: Smithsonian Institution Press, 1981).

59 For example J.A. Green, "Towards a Détente With History: Confronting Canada's Colonial Legacy" (1995) 12 International Journal of Canadian Studies 85.

(including codified law), mathematics, the modern state, capitalism, overseas exploration, and the Industrial Revolution[60] — even in the face of contrary evidence, one might add.

Still, following Blaut, the problem with eurocentric diffusionism is twofold. It raises not only empirical issues, but also questions about the history of European ideas and the social context of these ideas, since it forms a system of belief that, in the guise of a supertheory, justifies the "coloniser's model of the world." Legal discourse does not escape the pitfalls of eurocentric diffusionism. As Robert Williams has justly observed, law, which was "regarded by the West as its most respected and cherished instrument of civilization, was also the West's most vital and effective instrument of empire."[61]

Under the circumstances it is hardly surprising that there is considerable controversy over treaties and treaty-making involving Indigenous peoples — controversy that places a heavy burden on the establishment of more just relations between Indigenous peoples and states in the future.

IV. TREATY CONTROVERSY

In July 1990 I had the opportunity to attend a large Treaty Six gathering at the Joseph Bighead Reserve in Saskatchewan, and to listen to the testimony of Chiefs and Elders regarding the conclusion of the treaty in 1876. The gist of the numerous speeches I heard during the 1990 meeting are well conveyed by the following published statement of one Elder from Onion Lake (Alberta):[62]

> Our Elders in council sat together and swore by the sacred objects to the ultimate truth that [the Treaty] would be carried out without disruption. A representative of the Crown came and sat with our people. [The commissioner] was asked if he understood that this pact is with life, with the Spirit, to take care of our future needs, because there is no way that they could replace what the Creator has placed here for us, what we had and enjoyed since time immemorial. He said that "We don't come here to take away your way of life; everything will be parallel. The land that you allow us to use — no way will we take away your lakes, waters, rivers, animals, fish, mountains, forests; they are still yours, and you will always have them." Again and again, four times, this person was asked: "What are you pledging, what are you promising?" My father passed this on to me.

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[60] J.M. Blaut, *The Colonizer's Model of the World: Geographical Diffusionism and Eurocentric History* (New York: The Guilford Press, 1993) at 6, 7-8.

[61] R.A. Williams Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990) at 6.

[62] Elder J. Cannepotatoe during the "First Nations Circle on the Constitution" cited in Assembly of First Nations, *To the Source* (Ottawa: Assembly of First Nations, 1992) at 49.

These words illustrate the fundamental misunderstanding between Indigenous and state parties to treaties. Indigenous peoples consistently have upheld a rationale of treaty-making based on the principle of reciprocity, while states, whether European colonial powers or their overseas territorial successors, gradually have sought to utilize treaties initially to gain territorial or other advantages and ultimately to achieve hegemony.

How do Indigenous peoples express what they view as the rationale of treaty-making?[63] The most important event at present-day treaty gatherings is the re-enactment of the pipe ceremony, which marked the beginning and the closing of the original negotiations. The Elders hold that the essence of the Treaty survives not in the written text but in the sacred pipe. Indeed, the treaty itself is sacred, watched over by the Creator and therefore cannot be broken: "Our Elders in council sat together and swore by the sacred objects to the ultimate truth that the Treaty would be carried out without disruption" — "this pact is with life, with the Spirit."

One chosen Elder per generation looks after the pipe used in 1876, and performs the sacred and secret songs intrinsic to this ritual responsibility. Each individual Elder holds part of the knowledge about the Treaty and perpetuates his or her own version of it. Not one version coincides with the tenor of the official written text, however, according to which the Indigenous peoples involved did "cede, release, surrender and yield up to the Government of the Dominion of Canada, for her Majesty the Queen and her successors, all their rights, titles and privileges, whatsoever" to the lands defined in that text.

Treaty Six Chiefs and Elders have always denied that land ever was ceded, for this was impossible. The elder quoted above reminds us: "There is no way they could replace what the Creator has placed here for us, that we had and enjoyed since time immemorial." Land may be shared, however. Traditional authorities on Treaty Six hold that their forebears agreed to share the top soil, since the European settlers were determined to farm, but retained the subsoil as well as the right to hunt, trap and fish on so-called treaty land (which is not co-extensive with the reserve). Still, according to the Elder, the Treaty

[63] Compare this with the proceedings of a meeting similar to the one I attended in 1990. See *Honour Bound: Onion Lake and the Spirit of Treaty Six* (Copenhagen: IWGIA Document No. 84, 1997). See also S. Venne, "Understanding Treaty Six: An Indigenous Perspective" in M. Asch, ed., *Aboriginal and Treaty Rights in Canada* (Vancouver: University of British Columbia Press, 1997) at 173.

Commissioner said: "We don't come here to take away your way of life; everything will be parallel. The land you allow us to use — no way will we take away your lakes, waters, rivers, animals, fish, mountains, forests; they are still yours, and you will always have them."

This is not an isolated instance. A recent study of Treaty Seven concluded the following:[64]

> The evidence given by Treaty 7 Elders from the time the treaty was signed in 1877 to the present has not changed. In the oral histories passed down from generation to generation, their understanding of what happened at Blackfoot Crossing remains consistent .... The elders have said that Treaty 7 was a peace treaty; none of them recalled any mention of a land surrender .... They remembered that they would share the land with the newcomers and in return would be provided with the benefits that the new society could offer them, such as assistance in agriculture and ranching.

A similar case can be made for Treaty Eight, whose oral version as upheld by the Dene departs significantly from the official written document — a fact that became more widely known at the time of the *Paulette* case in the early 1970s.[65] The Dene have consistently maintained that Treaty Eight was a peace treaty providing for the sharing of land, not a "surrender" compelling them to abandon their traditional economy and to live on reserve.[66]

In the Canadian context, Indigenous treaty discourse thus puts to the test official treaty historiography,[67] which distinguishes between early treaties of peace, alliance and friendship, and so-called surrenders or purchases dealing with lands and resources. The latter are said to include two dozen treaties concluded between 1784 and 1850, including the two Robinson treaties, and the so-called numbered treaties. The official Ottawa view claims that these treaties cleared aboriginal title, first to Upper Canada and then to large portions of

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[64] Treaty 7 Elders and Tribal Council, *The True Spirit and Original Intent of Treaty 7* (Montréal: McGill-Queen's University Press, 1996) at 323-324.

[65] See the transcripts from *Re Paulette et al. and Registrar of Titles (No. 2)* (1973), 42 D.L.R. (3d) 8 (N.W.T.S.C.).

[66] For example R. Fumoleau, *As Long as This Land Shall Last: A History of Treaty Eight and Treaty Eleven 1870-1939* (Toronto: McClelland & Stewart, 1973).

[67] R.C. Daniel, *A History of Native Claims Process in Canada* (Ottawa: Department of Indian and Northern Affairs, 1980). G. Brown and R. Maguire, *Indian Treaties in Historical Perspective* (Ottawa: Department of Indian and Northern Affairs, 1979). W. Daugherty, *Maritime Treaties in Historical Perspective* (Ottawa: Department of Indian and Northern Affairs, 1983). All three of these documents were originally prepared for the Research Branch of the then Department of Indian and Northern Affairs.

western and northwestern Canada. They take this position because state parties, at least since the mid-nineteenth century, have tended to view treaty-making as a means of securing clear title to the Indigenous lands, while promoting the assimilation of Indigenous people into the wider society and its development schemes. Conversely, Indigenous peoples regard treaties as proof and guarantee of their continued nationhood, historical connection to the land, and cultural distinctiveness. They continue to focus on the treaty relationship, a relationship they consider as one between equal partners and one to be reconfirmed periodically.

Similar cases are to be found elsewhere. For example, the Treaty of Waitangi of 6 February 1840, between the British Crown and a vast number of Maori Chiefs, is viewed by the legal and political establishment as legitimizing the founding of the state of New Zealand. It is generally argued that domestication is inscribed in the Treaty of Waitangi itself and that, in signing the Treaty, the British Crown secured internal and external sovereignty simultaneously, notably by granting the Maori British citizenship and, subsequently, political representation (since 1867 Maori occupy several seats in Parliament). According to Brownlie, the execution of the Treaty of Waitangi "meant that the separate international identity of the Confederation of Chiefs was extinguished and the procedure of implementation of the reciprocal promises was transferred from the plane of international law to the plane of internal public law."[68] Brownlie shares Prucha's view when affirming that the Treaty of Waitangi illustrates a "remarkable anomaly" since it "does not fit into the normal pattern, that is, of external treaty obligations."[69] For many New Zealanders, the Treaty of Waitangi is considered evidence of Maori acceptance of Pakeha annexation and settlement. As such it is usually included among the various texts that stand for New Zealand's Constitution.[70]

Nevertheless, there is considerable difference of opinion as to the meaning and standing of the Waitangi Treaty, the official version of which exists both in English and in Maori.[71] Controversy pertains mainly to what was actually ceded,

[68] Brownlie, *supra* note 6 at 9.

[69] Prucha, *supra* note 29 at 26.

[70] A.P. Blaustein and G.H. Flanz, eds., *Constitutions of the Countries of the World* (Dobbs Ferry, N.Y.: Oceana Publications, 1971–).

[71] For example C. Orange, *The Treaty of Waitangi* (Wellington: Allen & Unwin, 1987); and I.H. Kawharu, *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Auckland: Oxford University Press, 1989). The official English and Maori versions of the Treaty are contained in the *Treaty of Waitangi Act*, New Zealand Statutes (1975), No. 114.

which is contingent on two fundamental concepts, namely sovereignty (*rangatiratanga*) and governance (*kawanatanga*). While Pakeha have always upheld that the Treaty transferred *rangatiratanga* to the Crown, Maori argue that *rangatiratanga*, understood as the powers and obligations of traditional Chiefs, cannot be ceded; what was transferred was governance, *kawanatanga*. One Maori adage about the Treaty of Waitangi expresses this crucial difference well: "Only the shadow of the land is to the Queen, but the substance remains to us."[72] In short, Maori viewed the Treaty as a means of solving conflicts of jurisdiction between two different political communities seeking a *modus vivendi*.

As these examples show, the main divergence of opinion between Indigenous peoples and states regarding treaties evolves around sovereignty and peoplehood. Indigenous peoples are keeping up an international perspective on the treaties to which they are parties, while states attempt to discount that perspective on the strength of the paradigm of domestication. Yet, when considered in light of the history of international relations since the "age of discoveries," the legitimacy of this paradigm of domestication is challenged by significant differences between international law doctrine and state practice as documented above. It also is challenged by the fact that legal doctrine has tended to overstate the historical depth of the eurocentric and positivist outlook characteristic of the heyday of European colonialism and imperialism.

It is my contention that, from the point of view of Indigenous parties to treaties, the most intelligible rationale for treaty-making is what Jörg Fisch calls negative equality.[73] Peoples previously unknown to each other, he writes, can only envisage a form of exchange that entails identical rights and obligations for all, with relations firmly confined to the realm of external sovereignty. In this sense, controversy arises from the fact that non-Indigenous treaty parties at one point shifted from that rationale and abandoned reciprocity as a fundamental principle of law.

A revised Maori version of the Treaty was included in the *Treaty of Waiangi Amendment Act*, New Zealand Statutes (1985), No. 148. Whether the official Maori version properly reflects Maori traditions regarding the Treaty is a moot question.

[72] Orange, *supra* note 71 at 83. This may be compared with P. Havemann, "'What's in the Treaty?' Constitutionalizing Maori Rights in the Aotearoa/New Zealand 1975-1993" in K.M. Hazelhurst, ed., *Legal Pluralism and the Colonial Legacy* (Aldershot: Avebury, 1995) at 73.

[73] J. Fisch, *Die europäische Expansion und das Völkerrecht* (Stuttgart: Steiner, 1984).

The significance of virtual reciprocity is nonetheless underscored by the attempts European powers made to justify their claims, in strictly legal terms, to supremacy or hegemony over peoples overseas. In reality, such justification tended to be dispensed with in the long run, unless claims had to be argued vis-à-vis European contenders; hence the ideological function of colonial law and native law, as well as of concepts such as "right of conquest" and "right of discovery."

It is worth recalling, however, that the principle of "right of discovery" had no bearing upon relations between European powers and Indigenous peoples. According to Lindley, the discoverer's state only gained "the right, as against other European powers, to take steps which were appropriate to the acquisition of the territory in question. What those steps were would depend on whether there was already a native population in possession of the territory."[74]

To assess the significance of steps to acquire Indigenous territory, one needed to know whether rights were being transferred to, or received by, those who were actually the bearers of such rights. In the case of territorial cession the question was whether the transferor was capable of passing on a valid title. In the case of a peace treaty, as another example, the question was whether the opposite party was in a position to enforce the peace. It was essential that overseas people held sovereign powers — powers in public law, both external and internal — so that the transferee, that is any European power, should receive rights capable of being enjoyed in international law and valid vis-à-vis other powers. Consequently, to the extent that European powers received territorial rights from peoples overseas and, when necessary, invoked these rights against contenders for the same privileges, they certainly admitted that these peoples had the sovereign power to transfer such rights. Alexandrowicz expressed this in the following terms: since treaty-making is "one of the essential attributes of external sovereignty," politically organized communities concluding treaties on an equal footing with sovereign entities such as a European state "must be presumed to have a measure of independent juridical existence in the international field."[75]

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[74] Lindley, *supra* note 10 at 26-27. In international jurisprudence the best-known example of this position is the Advisory Opinion in *Western Sahara* which stated *inter alia*: "Whatever differences of opinion there may be among jurists, the state practice of the relevant period [that is, when Spain engaged in colonization of the Western Sahara in the 1880s] indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terra nullius*" (1975) I.C.J. Rep. 6.

[75] Alexandrowicz (1967), *supra* note 9 at 149.

A close reading of Alexandrowicz's important work indicates that, when overseas peoples were divested of their "independent juridical existence in the international field," it was the result of doctrinal change and could not be presumed to have affected their inherent sovereignty.[76] Alexandrowicz makes this point with regard to Asian states, but there are lessons to be drawn for the history of treaty-making in North America and the specific case of the peoples now defined as Indigenous in former European settler colonies.[77] At stake is the theory of constitutivism, that is, the doctrine holding that states or sovereign entities only exist to the extent they are recognized as such by the majority of states. For the purpose of the argument made here, the problems raised by constitutivism are of the same order as those raised by the paradigm of domestication. According to Alexandrowicz:[78]

> The conversion of Asian States, which before the nineteenth century had been members of the universal family of nations, into candidates for admission to this family or for recognition by the leading powers was brought about by doctrinal change, particularly by the abandonment of the natural law doctrine and adherence to positivism of the European brand. Such doctrinal change cannot be presumed to have affected the status of Sovereign States, the presumption being offensive to the continuity of the family of nations.

Further along he adds:[79]

> Admission of new States was and is possible only in relation to entities which came newly into being. It cannot comprise those of them which existed long before and drew their legal status from a law of civilized nations in mutual intercourse whose universality had been an undisputed reality.

Viewed from this perspective, the status of Indigenous peoples in North America demands reconsideration for one can hardly say that they are entities newly come into being.

In this connection it also is useful to remember that, in the American context, Chief Justice John Marshall regarded the character of Indigenous peoples as "domestic dependent nations," as presupposing that their dependency flowed from the treaty relationship. Nothing in his rulings allows one to surmise that he

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[76] I. Schulte-Tenckhoff, "The Function of Otherness in Treaty Making" in E. van Rouveroy van Niewaal and W. Zips, eds., *Sovereignty, Legitimacy and Power in West African Societies* (Hamburg: Lit-Verlag, 1998).

[77] For example D. Dörr, "Die 'Wilden' und das Völkerrecht" (1991) 24 Verfassung und Recht in Übersee 372.

[78] Alexandrowicz (1967), *supra* note 9 at 235.

[79] *Ibid*. at 240 note L.

would have justified unilateral imposition of guardianship. A relevant example is the issue of protection provisions often included in treaties with Indigenous peoples. Indeed, self-declaration by a given people that they are under the protection of the United States fundamentally implied a consensual alliance. It can hardly be a basis for "trust title," that is, the legal concept which accords the U.S. government authority to exercise exceptional powers over Indigenous property and Indigenous affairs. In 1832, Marshall argued regarding the position of the Cherokees:[80]

> By various treaties, the Cherokees have placed themselves under the protection of the United States: they have agreed to trade with no other people, nor invoke the protection of any other sovereignty. But such engagements do not divest them of the right of self government, nor destroy their capacity to enter into treaties or compacts.

Cohen also tackled the apparent contradiction between the recognition of the national character of the Indigenous peoples on the basis of treaties, and provisions enshrining these peoples' dependency upon the United States, by replacing it in the broader context of international relations. He argued that the protectorate of the United States over Indigenous peoples was "similar to that established in a great variety of cases between great powers and small, weak or backward states." Consequently, infringements upon Indigenous jurisdiction contained in treaties "may be likened to the limitations imposed upon the jurisdiction of certain oriental states, such as China, over the nationals of western countries residing within their territories."[81]

Classic treaties of protection, such as those concluded between Britain and African rulers in the early nineteenth century, stipulated "a relationship characterized by divided sovereignty, [with] external sovereignty vesting in the British while internal sovereignty remained in the African Chief."[82] This conception is more in keeping with the central motif summoned by the Cree Elder quoted above when recalling the words of the treaty commissioner: "everything will be parallel."

Much of the controversy surrounding the interpretation of treaties hinges on this famous motif evoking the Two Row Wampum and similar compacts dating back to initial relations between Indigenous peoples and the European newcomers to North America. Through this conception Indigenous peoples reintegrate themselves in the "family of nations." The necessity for that

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[80] *Worcester*, *supra* note 26 at 581.

[81] Cohen, *supra* note 20 at 41.

[82] Alexandrowicz (1973), *supra* note 11 at 62-63.

reintegration must be conceded regardless of their currently imposed "minority" status. Only by acknowledging Indigenous treaty discourse for what it is, in light of a critical historiography of international relations, can the "restructuring of the relationship" advocated by the Royal Commission on Aboriginal Peoples actually take place.[83]

Such acknowledgment presupposes a series of theoretical and methodological readjustments. One concerns the recognition of the universal character of the "law of nations" and the persistence of "certain *functional* qualities" of the natural law ideology well beyond the classic era of treaty-making (16th-18th centuries), especially the concept of the universality of international law and the absence of constitutivism.[84] Another important point is that in purely legal terms, differences in legal-political organization cannot be used to contest the validity and status of treaties under international law. Nor, for that matter, can "otherness" be invoked to deny inherent rights. This point was underscored by Alexandrowicz in his study of African treaties which, especially during the so-called scramble for African territory in the late nineteenth century, showed marked similarities to Indigenous treaties in North America. Regarding land cessions, Alexandrowicz stressed that it was practically "irrelevant how the title holding entity was classified in one or the other doctrine of law" if an effective transfer of title took place and if that title "related to rights and obligations connected with the exercise of sovereign power." He observed that, in spite of differences in legal-political organization, both European and overseas rulers "were in approximate agreement as to their capacity of transferring and receiving sovereign rights."[85]

These observations offer food for thought as far as the implications between constitutivism, the paradigm of domestication and legal positivism are concerned. What is at stake may be termed the implicit politics of legal positivism. Nothing much seems to have changed since Hooker wrote in his classic work: "In countries with an indigenous population, especially in the Western hemisphere, the primacy of derived law over the indigenous law is taken as a fundamental premiss"[86] — a premiss going unchallenged and unquestioned, considering the actual state of the art regarding the study of

[83] Royal Commission on Aboriginal Peoples, *supra* note 4.

[84] Alexandrowicz (1967), *supra* note 9 at 9 [emphasis in the original].

[85] Alexandrowicz (1973), *supra* note 11 at 96.

[86] M.B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Oxford: Clarendon Press, 1975) at 357.

Indigenous treaties.[87] Consequently, another necessary readjustment would consist in submitting to the tenets of contemporary epistemological awareness regarding the problem of cultural authority in the discourses of law. To launch this theme, I would like to return briefly to the New Zealand example.

According to Brownlie, the Treaty of Waitangi would be “much enhanced” by New Zealand’s current commitments to international human rights instruments.[88] In Brownlie’s view, Maori do not constitute a unit of self-determination. Consequently, international human rights standards “should take care of most of the legitimate concerns of indigenous peoples,” provided one does away with the controversial category of Indigenous people, reliance on which “smacks of nominalism and a sort of snobbery”[89] The problem of Maori in New Zealand is one of “equity between early and subsequent arrivals.”[90] Making claims as an Indigenous people amounts to “a claim not of equality but of priority and privilege.”[91]

One of the principal pitfalls of Brownlie’s approach — or, for that matter, any essentially liberal approach to the issue of Indigenous rights — lies in the amalgamation of Indigenous peoples as ethnic or national minorities, and the corresponding representation of cultural difference. A brief look at the use (and abuse) of the culture concept in the debate over the rights of non-state entities sheds additional light on the problematic of Indigenous treaties.

V. RETHINKING CULTURE IN LAW

In the Canadian context, the relatively easy yet highly problematic accommodation of “culture” within the prevalent liberal rights paradigm is clearly borne out by the legal discourse. For example, in the *Van der Peet*[92] decision, the majority of the court opined that, in assessing a claim to an aboriginal right, the court must identify the nature of that claim by determining

[87] The issue is highly topical as is illustrated by Grammond’s recent study on treaties in Canada. See Grammond, *supra* note 6. See also I. Schulte-Tenckhoff [a review of Grammond’s *Les traités entre l’État canadien et les peuples autochtones*] (1996) 26 *Recherches amérindiennes au Québec* 89 at 94 (includes an author’s response that confirms precisely the point I am making).

[88] Brownlie, *supra* note 6 at 24.

[89] *Ibid*. at 62, 63.

[90] *Ibid*. at 51.

[91] *Ibid*. at 73.

[92] *R*. v. *Van der Peet* (1996), 137 D.L.R. (4th) 289 [hereinafter *Van der Peet*].

the existence of an Aboriginal right. Hence the "distinctive culture test" by which "the aboriginal claimant must do more than demonstrate that a practice, tradition or custom was an aspect of, or took place in, the aboriginal society of which he or she is a part." It must be demonstrated "that the practice, tradition or custom was a central and significant part of the society's distinctive culture," meaning that it is "one of the things which made the culture of the society distinctive — that it was one of the things that truly *made the society what it was*."[93] Once the nature of the claim is properly identified, the court must then determine whether in pre-contact times the practice, tradition or custom claimed was an integral part of the distinctive culture. Why? "Because it is the fact that distinctive aboriginal societies lived on the land prior to the arrival of Europeans that underlies the aboriginal rights protected by section 35(1), it is to that pre-contact period that the courts must look in identifying aboriginal rights."[94]

This approach is fraught with problems because it ignores anthropological evidence and scholarship, leaving any and every decision vulnerable to challenge. In anthropology, "culture" is not a given; it is an analytical rather than a descriptive term, representing a way in which to conceptualize and reflect on the reality of human societies. It is abstracted from observed social behavior, although there is considerable philosophical and epistemological controversy about what this abstraction involves. Moreover, to the extent that anthropology deals with cultures in the sense of autonomous population units defined by distinctive cultural characteristics or shared traditions, it is assumed that these are constructed by social actors and that they are constructed over time.

There is only minimal consensus among anthropologists as to the scope, substance and significance of the culture concept, as well as about the analytical weight that culture carries by comparison with, say, economic processes, political institutions, or class interests. But, by and large, the anthropological culture concept is basically a holistic one as prefigured by Tylor's classic definition:[95]

> Culture or civilization, taken in its wide ethnographic sense, is that complex whole which includes knowledge, belief, art, morals, law, custom and any other capabilities and habits, acquired by man as a member of society.

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93 *Ibid.* at 313-314 [emphasis in the original].

94 *Ibid.* at 315.

95 E.B. Tylor, *Primitive Culture* (New York: Harper & Row, 1958, first published in 1871).

Needless to say, this definition has undergone countless revisions and challenges over the last 120 years.[96] It is important to note, however, that the holistic perspective commanding it (which undoubtedly is characteristic of anthropology as a discipline), hardly allows one to decide with any precision "what makes a society what it is." It cannot credit any notion of a central culture trait removed from the realm of history as evidence admissible in court. Moreover, there is no agreement among anthropologists, ethnohistorians, and archaeologists as to the time-frame involved in assertions such as those made in *Van der Peet*. How can a court determine "contact" with sufficient precision to make it a relevant criterion? And contact with whom? There is ample evidence of visits to both Atlantic and Pacific coasts prior to 1492.

From an anthropological viewpoint, the *Van der Peet* test therefore seems arbitrary and fails to account for two central features of the culture concept in its contemporary and critical meaning, namely, its systemic character and its historicity.

The problem is compounded by the very nature of Canada's common law tradition, considering the role of *Van der Peet* as a precedent.[97] Most recently, the positive aspects of the Supreme Court of Canada decision in *Delgamuukw v. British Columbia,* such as the admission of Indigenous oral evidence in court, are overshadowed by reasoning based on *Van der Peet.* For example, *Delgamuukw* establishes the notion of a culturally restricted use of the land by Indigenous peoples: "The content of aboriginal title contains an inherent limit in that lands so held cannot be used in a manner that is irreconcilable with the nature of the claimants' attachment to those lands."[98] Furthermore: "lands held by virtue of aboriginal title may not be alienated ... The land has an inherent and unique value in itself, which is enjoyed by the community with aboriginal title to it. The community cannot put the land to uses which would destroy that value."[99]

Under the circumstances, Indigenous peoples cannot win. In the past they were denied rights because of their "otherness" and their alleged inability to adapt to European ways. Subsequently, they have been denied rights because of

[96] A.L. Kroeber and C. Kluckhohn, *Culture: A Critical Review of Concepts and Definitions* (New York: Vintage Books, 1963).

[97] See *R.* v. *Pamajewon et al.* (1996), 138 D.L.R. (4th) 204 (S.C.C.). This case addresses the issue of on-reserve gaming.

[98] *Delgamuukw* v. *British Columbia* (1997), 153 D.L.R. (4th) 193 at 246 (S.C.C.).

[99] *Ibid.* at 247-48.

their alleged assimilation into mainstream culture. Now, although they are being invited to reclaim rights, this is on the condition they comply with exogenously defined standards of "cultural distinctiveness."

This dilemma echoes the growing tendency of subsuming under "Indigenous" certain socio-economic lifestyles: Indigenous peoples are said to be those whose modes of life differ fundamentally from modern industrialised society with its sophisticated technology and consumption patterns, being based on hunting and gathering, trapping, swidden agriculture, or transhumance. Moreover, many of these activities relate to habitats located in so-called frontier zones such as the tropical or boreal rain forests.[100] The reduction of "indigenousness" to specific lifestyles raises important theoretical questions concerning the ideological function of the qualifier "Indigenous" and the attendant dangers of essentializing "indigenousness" or even freezing it in time.[101]

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[100] An addition to the initial formulation of the working definition of Indigenous peoples provided by Martinez Cobo underscored this focus: "Although they have not suffered conquest or colonization, isolated and marginal groups existing in the country should also be regarded as covered by the notion of 'indigenous populations' for the following reasons: (a) they are descendants of groups which were in the territory of the country at the time when other groups of different cultures or ethnic origins arrived there; (b)precisely because of their isolation from other segments of the country's population they have preserved almost intact the customs and traditions of their ancestors which are similar to those characterized as indigenous; (c) they are, even if only formally, placed under a State structure which incorporates national, social and cultural characteristics alien to others..." UN doc. E/CN.4/Sub.2/L/566 at para. 45. Compare this definition with *ibid.* at para. 34. According to J. Burger, Indigenous peoples are those who: "1. are descendants of the original inhabitants of a territory which has been overcome by conquest; 2. are nomadic and semi-nomadic peoples, such as shifting cultivators, herders, hunters and gatherers, and practice an intensive form of agriculture which produces little surplus and has low energy needs; 3. do not have centralized political institutions and organize at the level of the community and make decisions on a consensual basis; 4. have all the characteristics of a national minority; they share a common language, religion, culture and other identifying characteristics and a relationship to a particular territory, but a subjugated by a dominant culture and society; 5. have a different world-view consisting of a custodial and non-materialist attitude to land and natural resources, and want to pursue a separate development to that proffered by the dominant society; consist of individuals who subjectively consider themselves to be indigenous, and are accepted by the group as such..." See J. Burger, *Report From the Frontier: The State of the World's Indigenous Peoples* (London: Zed Books, 1987) at 9.

[101] I. Schulte-Tenckhoff and S. Horner, "Le Bon sauvage, nouvelle donne" in F. Sabelli, ed., *Ecologie contre nature* (Paris: Presses Universitaires de France, 1995) at 21.

Such a tendency is part of a process that, following Alan Hunt (and Gramsci), I would describe as "incorporative hegemony," that is, the articulation by the dominant hegemony of values and norms in such a way that they take on a generalized appeal — albeit, in this instance, not primarily across class lines, as in Hunt's model derived from the study of British legal history.[102] I would argue that in the cases under review in this article, "cultural difference" fills the role of such a value and norm and is taking on a generalized appeal, but not necessarily in a manner that would allow Indigenous peoples any measure of control over, for example, resources or jurisdiction. With regard to the situation of Indigenous peoples, the significance of the project of multiculturalism in former European settler colonies thus warrants further study. It turns out that the celebration of Indigenous cultural difference in countries such as Canada may actually undermine any potential for Indigenous self-determination. As David Schneiderman has convincingly argued, one must understand "that the aspirations of Aboriginal peoples are not simply to be treated as vestiges of cultural differences, but those of nations disinherited by the unquestioned operation of the colonizer's constitutional law."[103] In other words, one notes a strong complicity between the paradigm of domestication and what may be termed liberal culturalism, that is, the relatively uncritical use of the culture factor in connection with the type of consequential individualism[104] presently advocated to accommodate collective rights, at least temporarily, by considering these in strategic terms with the purpose of dislodging structural and institutional impediments to individual rights of non-discrimination. This approach represents a variation on the more orthodox liberal view that confines cultural rights to the realm of the individual (the individual being regarded as the ultimate agent of action and, consequently, as the ultimate bearer of rights and unit of moral worth),[105] indeed ties these rights to the individual in a manner reminiscent of property.[106]

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[102] A. Hunt, *Explorations in Law and Society: Toward a Constitutive Theory of Law* (New York: Routledge, 1993) at 230.

[103] D. Schneiderman, "Theorists of Difference and the Interpretation of Aboriginal and Treaty Rights" (1996) 14 International Journal of Canadian Studies 35.

[104] This follows the terminology used by A. Addis, "Individualism, Communitarianism and the Rights of Ethnic Minorities" (1991) Notre Dame L. Rev. 1219 at 1235.

[105] C. Kukathas, "Are There any Cultural Rights?" (1992) 20 Political Theory 105.

[106] R. Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977). Compare this with J. Nedelsky, "Reconcieving Rights as Relationships," in J. Hart and R.W. Bauman, eds., *Explorations in Difference: Law, Culture, and Politics* (Toronto: University of Toronto Press, 1996) at 67.

A sophisticated formulation of consequential individualism is Kymlicka's theory of minority rights situated "within the moral ontology of liberalism."[107] The latter is based on the principles of individual autonomy and freedom of choice, and inspired by Rawls's social justice model, grounded in the idea that the interests of each member of the political community matter equally in the two basic social institutions of modern society, namely the market system and the political process of majority government.[108] However, according to Kymlicka: "a liberal needs to know whether the request for special rights or resources is grounded in differential choice or unequal circumstances," (this is to say, when groups are outbid in the market and outvoted in majority elective government),[109] in which case appropriate measures need to be taken to rectify inequalities suffered collectively. Consequently, when the cultural and the political community are not coextensive, the liberal principle of equal respect for persons may require the recognition of collective rights for the protection of cultural groups. This entails a consociational — rather than universal — mode of incorporating the individual into the liberal state. Accordingly, the nature of each person's rights varies with the particular community to which he or she belongs.[110]

For the purpose of the argument pursued in this article, the principal ambiguity surrounding Kymlicka's theory is that it blurs any distinction between Indigenous peoples and minorities, despite the fact that Indigenous peoples categorically reject any reference to them as minorities. Moreover, the distinction between Indigenous peoples and minorities has come to be well established internationally, as will be discussed below. In his most recent work Kymlicka generally refers to Indigenous peoples as "national minorities"[111] in contrast with "ethnic groups," following his characterization of multiculturalism as encompassing both multinationality and polyethnicity, but excluding so-called new social movements.[112] He defines "national minorities" — whose New World variety is said to include, for example, American Indians and Native Hawaiians — as "distinct and potentially self-governing societies incorporated into larger states" and defines "ethnic groups" (for example, Sikhs in Canada)

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[107] W. Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1989) at 140.

[108] J. Rawls, *A Theory of Justice* (Cambridge MA: The Belknap Press, 1971).

[109] Kymlicka (1989), *supra* note 107 at 186, 183.

[110] *Ibid*. at 150-154.

[111] W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon, 1995) at 22.

[112] *Ibid*. at 19.

as "immigrants who have left their national community to enter another society."[113]

Kymlicka's use of the category "national minority" to define Indigenous peoples is unusual, to say the least, given its historical and ideological connotations. Moreover, it is not supported by either the Canadian or the international state of the debate. For example, in his attempt to define the concept of minority, Justice Jules Deschênes, former Canadian member of the U.N. Sub-Commission on prevention of discrimination and protection of minorities, specifically excluded Indigenous peoples, basing his decision on the *1982 Constitution Act* and international practice.[114] Finally, it is problematic because of its implications regarding the relevance of the cultural factor in the determination of collective rights. Kymlicka defines national minorities as "cultural groups,"[115] using the widespread, and rather imprecise, understanding of "culture" as "a culture," that is, an autonomous population unit defined by shared traditions which, the liberal paradigm *oblige*, supplies a crucial context of choice: "it's only through having a rich and secure cultural structure that people can become aware, in a vivid way, of the options available to them, and intelligently examine their value."[116] Both aspects deserve further comment.

As we have seen, the accommodation of "indigenousness" as culture raises problems when based on primordialist notions that fly in the face of anthropological knowledge and epistemological awareness. Anthropology undoubtedly has a role to play "to warn against the romanticization and instrumentalization of culture."[117] While one must distinguish between the

[113] *Ibid*.

[114] *Proposition concernant une définition du terme "minorité" présentée par M. Jules Deschênes*, 1985, UN doc. E/CN.4/Sub.2/1985/31 at paras. 36-38.

[115] This is in contrast to entities based on "race" or descent as exemplified by Kymlicka (1995), *supra* note 106 at 23. However, the distinction is problematic. "Race" and descent are cultural constructions as much as, if not more than, biological fact. Nor are the examples Kymlicka provides particularly well informed. Turks living in Germany are not banned from acquiring German citizenship because of their "blood lines" or whatever he is trying to imply. Rather, the issue is that Germany, like Belgium and some other countries, does not permit dual citizenship, and many Turks, though far from all, do not wish to renounce their Turkish citizenship to obtain German citizenship. Conversely, Germans or Belgians who are permanent residents of Canada may hesitate to apply for Canadian citizenship for the same reason.

[116] Kymlicka (1989), *supra* note 107 at 165.

[117] J.D. Eller, "Anti-anti-multiculturalism" (1997) 99 *American Anthropologist* 249 at 255.

strategic or political use of culture and more scholarly forms of cultural essentialism, the problem is that, as J.D. Eller points out:[118]

> ...multiculturalism, for all its lip service to culture, is not anthropology, is not interested in what anthropology is interested in, and is not even particularly well-informed culturally. It is not really global in most instances, but is about America, especially American minority groups.

As a social movement in the American context, and a political project enshrined in law in the Canadian one, multiculturalism incorporates a specific notion of culture that "in its more strident forms promotes a kind of cultural determinism and cultural incommensurability."[119]

Cultural determinism or cultural relativism regards culture as the main explanatory principle accounting for the whole range of differences and forms of behavior that may be found in human societies. In its extreme form, this approach allows one to view colonialism, for example, as a problem of "culture contact," "culture shock," or "acculturation," independent of factors such as the world system, the groups of people involved, their specific interests and power relations. Although extreme cultural relativism has been challenged, some of its assumptions linger. For example, cultural relativism has been invoked internationally to contest the validity of the idea of human rights as a "western construct." Cultural determinism and cultural relativism thus exhibit a certain ambivalence. On the one hand, when cultural relativism is paired with primordialist notions of culture, there is no basis left for moral judgement nor for theoretical distancing. Anything goes, so to speak — Nazism and apartheid could theoretically be viewed, and implicitly legitimized, as particular manifestations of culture. On the other hand, one must maintain a critical perspective on the implications of the cultural authority of a given legal discourse: the liberal conception of rights and justice, for instance, is far from culturally neutral.

Postmodernism with its rejection of "grand narratives" in favor of "local knowledge" and "*logiques métisses*"[120] has dealt a major blow to an essentialized

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[118] *Ibid*. at 251.

[119] *Ibid*. at 252.

[120] For example J.-F. Lyotard, *The Postmodern Condition: A Report on Knowledge* (Minneapolis: University of Minnesota Press, 1984); C. Geertz, "Local Knowledge: Fact and Law in Comparative Perspective" in C. Geertz, *Local Knowledge, Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983) 167; J.-L. Amselle, *Logiques métisses: Anthropologie de l'identité en Afrique et ailleurs* (Paris: Editions Payot, 1990).

view of culture by showing that there can be no act of identification that does not already entail an act of differentiation and exclusion. The principal question then is: can identity claims be validated without succumbing to "cultural absolutism"[121] and how, if at all, can such claims find expression in law? In this sense, while critical of the liberal approach and its lack of success in solving the predicament of Indigenous peoples or, rather, that of the state in former European settler colonies, I do not propose to advocate an approach situated at the other (communitarian) end.[122] Indeed, I think the issue transcends such a dichotomy, especially when addressed from an anthropological viewpoint: "while anthropology should be wary of multiculturalism, it must reject anti-multiculturalism."[123] Nor can I discuss at this stage other interpretations that are relevant to the question of Indigenous peoples, especially in Canada.[124] These points will be dealt with more in detail in another context.[125]

In considering whether the factor of "culture" can be made relevant to the problematic of Indigenous treaties, one notes that the celebration of cultural difference may actually foster a disparaging image of Indigenous peoples by seeking understanding for their "cultural shortcomings." In the case of treaties, such shortcomings are said to be illiteracy, lack of knowledge of English and of legal proceedings, and even the nature of the treaty. These issues have been addressed, *inter alia*, in connection with the question of whether treaties involving Indigenous peoples may be invalidated by essential and excusable error, that is, error concerning an element which determined the party's consent and which is not the fault of the party invoking the error. According to Grammond, flaw by error may be widespread in Indigenous treaties concluded until the beginning of the twentieth century, mainly because of "cultural differences between the contracting parties and the existence of radically different conceptions regarding the relationship between human beings and the land." He adds:[126]

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[121] R.E. Howard, "Cultural Absolutism and the Nostalgia for Community" (1993) 15 Hum. Rts. Q. 315.

[122] See for example M.J. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982).

[123] Eller, *supra* note 117 at 255.

[124] J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995). Compare this with Schneiderman, *supra* note 102.

[125] I. Schulte-Tenckhoff, *Domination / Subversion* (forthcoming).

[126] Grammond, *supra* note 6 at 54. Translation by author.

> For example, it is well known that the Indigenous people of the Prairies believed that the numbered treaties only provided for cohabitation and that they preserved the possibility of inhabiting and utilizing all of the territory covered by the treaties. On the other hand the Canadian Government has always considered these treaties as cessions of all territorial rights by the Indigenous people. This is undoubtedly a good example of error as obstacle.

This interpretation is contradicted by the notion of the "meeting of the minds" that has been used in Indigenous discourse regarding these particular treaties. When recalling the process of making Treaty Six, Sharon Venne explains: "The Chiefs and the treaty commissioners followed both Cree and international laws concerning treaty-making: the two equal parties negotiated in good faith, at arm's length, without external pressure, and arrived at a meeting of the minds."[127]

This motif also challenges a number of other assumptions, first and foremost, the idea that treaty-making was something alien for Indigenous peoples. There is ample evidence that numerous agreements were reached among Indigenous peoples in North America and elsewhere. For North America, oral histories regarding such treaties have come to light through research undertaken in connection with the work of the Royal Commission on Aboriginal Peoples. In a volume devoted to Treaty Seven, one learns, for example, that: "Treaty making had long been a way of life for the prairie First Nations, both through treaties signed among one another and through treaties signed with European colonizers."[128] As to other continents and countries, it should be noted that the international law of peoples overseas is, with very few exceptions,[129] a neglected area of legal history that warrants further study.

Another point concerns the question of Indigenous representation at treaty negotiations, especially the alleged manipulation of representation by treaty commissioners. According to Grammond, "it is possible that inadequate representation of the Indigenous People concerned renders a treaty null and void."[130] The question is: how can the "inadequateness" of Indigenous representation be decided, knowing that legal analysis is often biased by preconceived ideas about Indigenous forms of government and has lacked willingness to consider Indigenous legal systems as a relevant factor in the

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[127] Venne, *supra* note 63 at 188.

[128] Treaty 7 Elders, *supra* note 64 at 108.

[129] One notable exception is the Haudenosaunee; F. Jennings, *The History and Culture of Iroquois Diplomacy* (Syracuse, NY: Syracuse University Press, 1985). Another is Muslim or Hindu international law; see Alexandrowicz (1967), *supra* note 9.

[130] Grammond, *supra* note 6 at 57.

analysis of treaty provisions and the treaty relationship? For example, the anthropological impossibility of an "absence of government" still finds mention in recent works.[131] Yet evidence is accumulating about the exact composition of the Indigenous delegations and its significance in light of the political and legal organization of the people concerned.[132]

It follows that the discourses of law and politics, however "culturally sensitive" they purport to be, are nonetheless compelled — by the very nature of their institutional involvement — to account for the fact that, from the state point of view, Indigenous rights only exist within the confines of the Canadian legal system. This is clearly supported by the prevailing interpretation of section 35(1) — first, as "the means by which the Constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory."[133] There is nothing self-evident, however, about that reconciliation, considering the precise conflict of interpretation surrounding Indigenous treaties, for it seems to me that only those treaties can give legitimacy to "Crown sovereignty over Canadian territory."

Conflicting interpretations regarding treaty provisions and the modalities of treaty negotiation would not be a problem if all parties involved could address or redress them on an equal footing. However, Indigenous peoples lack an important quality, that is, recognition as peoples and the possibility of seeking redress collectively. As a result, they cannot assert their rights in any way but as individuals, both nationally as citizens (an option that Indigenous people in Canada started to have only in the 1960s), and at the international level via the human rights machinery of the United Nations. This brings me to my last point, namely, the similarities and differences between Indigenous peoples and minorities.

In the current international debate "culture" appears as the most likely, and least controversial, focus of collective rights, despite the fact that there seems to be a rather vague understanding of what cultural rights involve by comparison with, say, social and economic rights — a problem apparent from a close reading of the provisions of the *International Covenant on Economic, Social and*

[131] *Ibid*. at 23.

[132] Venne, *supra* note 63 at 189.

[133] *Van der Peet*, *supra* note 92 at 309-310.

Cultural Rights.[134] Moreover, one notes considerable ambiguity surrounding the meaning of "collective rights," which must be taken into account when considering culturalist adjustments to consequential individualism — for the latter rejects the notion of group rights, but not necessarily that of collective rights. There is a difference between rights of collective agents and rights to collective interests.[135] If collective entities matter, then the question is: which collective entity, other than a state, has the capacity of claiming rights? An Indigenous people? A national or ethnic minority? In light of existing international norms, it is the benefits to be derived from collective rights that matter, such as the right to enjoy one's culture in community with others, as stipulated by the U.N. *Declaration on the rights of persons belonging to ethnic or national, religious and linguistic minorities,*[136] which derives its rationale from Article 27 of the *International Covenant on Civil and Political Rights*:[137]

> In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, *in community with the other members of their group*, to enjoy their own culture, to profess and practice their own religion, or to use their own language (emphasis mine).

Thus, international legal instruments, to the extent they address cultural rights, do not provide for a group right of culture but only for individuals to belong to a culture and to enjoy that culture collectively. By the same token, they uphold the principle of non-discrimination with regard to "persons belonging to minorities" — not to minorities themselves, whose supposed nature is highly controversial, to the point that any attempt to define them has, to date, met with failure.[138]

It is important to note that the situation of minorities differs in this regard from that of Indigenous peoples for which the United Nations relies on a "working definition."[139] The similarities and differences between minorities and Indigenous peoples are, nevertheless, far from self-evident. They are no more

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[134] *International Covenant on Economic, Social and Cultural Rights*, GA Res. 2200 A (XXI), (16 December 1966).

[135] L. Green, "Two Views of Collective Rights" (1991) 4 Can. J. Law & Jur. 315.

[136] *Declaration on the Rights of Persons Belonging to Ethnic or National, Religious and Linguistic Minorities*, GA Res. 47/135 (18 December 1992).

[137] *International Covenant on Civil and Political Rights*, GA Res. 2200 A (XX1), UN GAOR, (16 December 1966).

[138] I. Schulte-Tenckhoff and T. Ansbach, "Les minorités en droit international" in A. Fenet, ed., *Le droit et les minorités: analyses et textes* (Brussels: Bruylant, 1995) 15 at 17 and 45.

[139] *Problem of Discrimination*, *supra* note 1 at 379.

self-evident than the qualifier "Indigenous" itself. This is especially true in English by comparison with the French *autochtone*, with its connotations of colonial history and territoriality.[140] In this sense, one may argue that "ethnic self-consciousness" (to take up an expression coined by W. Connor),[141] as well as differences in language, culture and religion are shared by minorities and Indigenous peoples alike. However, one trait is generally viewed as distinctive of Indigenous peoples, namely their historical relationship with the land, especially in former European settler colonies such as Canada — a relationship that is a fundamental component of their peoplehood. Consequently, while many Indigenous peoples actually happen to be numerical minorities, minorities are not necessarily Indigenous peoples.

By and large, Indigenous peoples form a highly diverse group in cultural as well as historical terms. Since the creation of the United Nations, many formerly "Indigenous" peoples — as opposed to the European colonisers — gained political independence. One may well say that today's Indigenous peoples are peoples yet be decolonized. Nonetheless, decolonization has not always been successful or complete. Many so-called ethnic problems are, above all, evidence of an illusory process of "indigenization." The demise of colonialism occurred on the strength of the idea of self-determination. Paradoxically, the newly emerged states in Africa and Asia were incapable, or unwilling, to accommodate the right of self-determination of the different peoples that found themselves within their often arbitrarily drawn borders. The question therefore is: can the right of self-determination be limited to territories under colonial domination, and has it run its course with the creation of new states and the departure of foreign colonial powers (this seems to be the rationale governing the United Nations' current attempt to do away with the Committee on Decolonization) or does it also apply to "self-conscious ethnic groups"? Both the emergence of the international Indigenous movement and the re-emergence of the minority issue as a result of the break-up of the former socialist multinational states put a new spin on the issue.

At the same time, a growing number of representatives of oppressed peoples in Africa and Asia seek to bring their grievances before the United Nations Working Group on Indigenous Populations established in 1982. Initially this Working Group was created in response to the situation of the original

[140] Defined in *Le Petit Robert* (1992 edition): "Autochtone, qui est issu su sol même où il habite, qui est censé n'y être pas venu par immigration."

[141] W. Connor, "The Politics of Ethnonationalism" (1973) 27 J. of Int'l Affairs 1 at 11.

inhabitants of former European settler colonies and the "New World."[142] Among the peoples from Asia and Africa who have made their voices heard in the international forum, one can identify different categories of victims of neocolonialism: so-called tribal peoples, often living on the margins of the national society and economy, nomadic peoples, and peoples whose traditional territory straddles a national border. In many cases, they are threatened by large-scale industrialization and resource extraction. Their claims mainly concern collective rights (or, rather, group rights?) to resources, territory, and political representation.

Such claims are voiced precisely in response to the processes of internal colonization that have accompanied state-building in the so-called third world. It follows that rights usually accorded "persons belonging to minorities" are not applicable there, for such rights are conceived of as individual rights of non-discrimination. While some effort has been made to address the issue of group rights during the drafting process of the draft *United Nations Declaration of the rights of Indigenous peoples* at the level of the Working Group of the Sub-Commission (where Indigenous peoples' representatives have played a crucial role), the strategic merits and political advantages of claiming the qualifier "Indigenous" for peoples that are victims of neocolonialism are nevertheless debatable. It must also be recalled that, as far as the Indigenous peoples of former European settler colonies are concerned, these peoples were excluded or partially absent from the process of state-building. For some, such exclusion simply poses a problem of civil rights. For others, it is evidence of the fact that Indigenous peoples have always constituted discreet entities with their own forms of government.

The significance of treaties and treaty-making in this configuration can hardly be overstressed.[143] The debate over the rights of non-state entities boils down to one fundamental issue, namely human rights in relation to peoples' rights. The rights of "persons belonging to minorities" are clearly situated within the framework of the United Nations human rights machinery. Yet attempts have been made, all at once, to distinguish these rights from those of Indigenous

[142] See I. Schulte-Tenckhoff, *supra* note 40, Part II. The working group has the twofold mandate of reviewing the human rights situation of Indigenous peoples worldwide, and of contributing to the elaboration of international standards for the protection of their rights; UN ECOSOC Res. 1982/34 (1982).

[143] In his second progress report Alfonso Martinez felt moved, in turn, to address what he termed the dichotomy between minorities and Indigenous peoples. *Second Progress Report*, *supra* note 2 at para. 48.

peoples (as is evidenced by the existence of two Declarations), and to introduce a distinctly Indigenous component into the complex of "rights of persons belonging to minorities." The latter is well illustrated by article 30 of the *International Convention on the Rights of the Child*:[144]

> In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.

The deliberate confusion between minority issues and the question of Indigenous peoples has important normative and political consequences which, although clearly linked to the evolution of the international debate, actually make sense in light of the paradigm of domestication. What is ultimately at stake, then, is the legal personality of Indigenous peoples, both in international law and in relation with the states in which they now live.

[144] *International Convention on the Rights of the Child*, GA Res. 44/25 (1989).

VI. CONCLUSION: THE PROBLEMATIC OF INDIGENOUS TREATIES

The United Nations treaty study reflects international recognition of the paramount importance of treaties for Indigenous peoples — and, given the legitimizing function of treaties, for states as well. As Vine Deloria phrased it for the American situation: "[c]onsent, the basis of modern Western social contract theory, can only be found in the Indian treaty relationship with the United States."[145]

The U.N. Special Rapporteur, M. Alfonso Martínez, defined as the ultimate purpose of his study to help secure "solid, durable and equitable bases for the current and, in particular, future relationships" between Indigenous peoples and the states in which they now live.[146] This was to be accomplished mainly by assessing how treaties and treaty-making can serve as a model for such relationships.

In this connection, the contemporary application of the treaty method in Canada, in the form of comprehensive land claims settlements ("modern treaties"), accounts for the topicality of the problematic in question. For "modern treaties" are but a veiled form of domestication. The veil is, of course, the upholding of the principle of seeking Indigenous consent as set out in the *Royal Proclamation of 1763*. What it conceals is the presence of one basically non-negotiable item, namely, blanket extinguishment. Although no longer explicit, this still lingers in the government approach. Thus, the Royal Commission on Aboriginal Peoples, in its recommendation dealing with the establishment of a process for making new treaties to replace the existing comprehensive claims policy, felt moved to clarify from the outset: "(a) The blanket extinguishment of Aboriginal land rights is not an option."[147]

On the other hand, the conclusions and recommendations reached by the Royal Commission with regard to treaties remain confined to the paradigm of domestication. One example is the historiography underpinning the report, notably the notion that early treaties require "completion:" "Treaty nations that are parties to peace and friendship treaties that did not purport to address land and resource issues have access to the treaty-making process to complete their

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[145] Deloria, *supra* note 27 at 315.

[146] *Initial Outline*, *supra* note 3 at para. 11.

[147] Royal Commission on Aboriginal Peoples, *supra* note 4 at 2.2.6.

treaty relationships with the Crown."[148] To give another example, efforts were made to accommodate the views traditionally held by Indigenous treaty parties, but oral evidence is still regarded as ancillary to written evidence: "Justice requires the fulfilment of the agreed terms of the treaties, as recorded in the treaty text and *supplemented by oral evidence*."[149]

The paradigm of domestication is of critical importance because of its pervasive nature and because it fosters circularity of argument by giving rise to assumptions that go unquestioned and unchallenged. Moreover, while it supports the preeminence of the state system, thus justifying the prevalent legal doctrine regarding Indigenous treaties, it ultimately delegitimizes state sovereignty over Indigenous territories. The only way to break free from this vicious circle consists in reconsidering the problem from the perspective of a (re)personalisation of Indigenous peoples. With states gradually losing ground as protagonists of the international system under the impact of globalization, the moment has come for innovative thinking.

As far as treaties and treaty-making between states and Indigenous peoples are concerned, a first step is to raise awareness of domestication — both as it reflects an attempt to legislate the Indigenous question out of existence and as a paradigm that continues to influence excessively (and sometimes despite evidence to the contrary) existing scholarship.

I have tried to show that the paradigm of domestication feeds on *ex post facto* reasoning that projects into the past the current configuration of international relations. Thus, the treaty controversy arises from the fact that non-Indigenous treaty parties shifted at one point from the rationale of reciprocity as a fundamental principle of law. It focuses specifically on questions of sovereignty and peoplehood. Indigenous peoples maintain an international perspective on treaties and in so doing reintegrate themselves in the "family of nations." It is their lack of an international legal personality that poses considerable problems for them when faced with the necessity of reasserting claims in treaty adjudication. States, on the other hand, have attempted to discount any international reference on the strength of the paradigm of domestication. Yet when considered in light of the history of international relations since the "age of discoveries," the legitimacy of that paradigm is challenged by significant differences between international law doctrine and state practice. It is also challenged by the fact that legal doctrine has tended to overstate the historical

[148] *Ibid.*

[149] *Ibid.* at 2.2.2 [emphasis added].

depth of the eurocentric and positivist outlook characteristic of the heyday of European colonialism and imperialism.

I also have tried to show that it is only in acknowledging Indigenous treaty discourse for what it is, on the basis of a critical approach to the historiography of international relations, that one can actually envisage the "restructuring of the relationship" between Indigenous peoples and states, as advocated by the Royal Commission on Aboriginal Peoples. For treaty controversy, particularly given the patent inequality of the parties involved, places a burden on any future "constructive arrangement" — to take up a term added belatedly (upon the initiative of the Canadian government) to the mandate of the Special Rapporteur of the U.N. study on treaties between Indigenous peoples and states.

The main theoretical and methodological adjustment required by such an acknowledgment concerns the implicit politics of legal positivism, notably, the complicity between liberal culturalism and the paradigm of domestication, as expressed in superficial culturalist adaptations to account for collective rights in a manner that does not threaten the liberal doctrine. Given the failure, to date, of that doctrine in solving the predicament of "indigenousness," one must look critically at the function of cultural difference (or "otherness") in the production of facts of law. In this regard, the issue of Indigenous treaties reflects the predicament *tout court* of Indigenous peoples in former European settler colonies. In colonial times, these peoples were denied their rights because they were considered to be too different from the settler society; at present, they continue to be denied their rights for being no longer different enough.

By virtue of the paradigm of domestication, cultural difference has been consistently invoked by states to contest Indigenous rights, especially when it was a matter of state obligations vis-à-vis Indigenous peoples. But this amounts to a political statement rather than compliance with standards of law. As long as the makers and interpreters of law see their principal role in justifying state sovereignty over Indigenous peoples, law is inherently political. This is not a truism. If it were, the ongoing debate on treaty rights, extinguishment and related issues — whether in Canada or elsewhere — would take a different direction.